

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas

S.C. Supreme Court

Carmen T. Mullen, Circuit Court Judge

Opinion No. 2014-UP-317 (S.C. Ct. App. Filed Aug. 6, 2014)

CHERRY SCOTT, as Personal Representative of the Estate
of ELIZABETH JONES,

Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a
Heritage of the Lowcountry and/or Uni-Health Post Acute
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION,

Petitioners.

PETITIONER'S APPENDIX (VOL. 2)

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Exhibit 18

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

Peggy Benton, as Power of
Attorney for Mary K. Weaver,
Plaintiff,

v.

Summit Place, Inc.,
Defendant.

IN THE COURT OF COMMON PLEAS
THIRTEENTH JUDICIAL CIRCUIT

C.A. No. 2003-CP-23-0267
4

ORDER
DENYING DEFENDANT'S MOTION
TO RECONSIDER

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL R. WILKINSON

2004 NOV 17 P 2:54

The court has reviewed Defendant Summit Place, Inc.'s Motion to Reconsider. For the following reasons, the motion is respectfully denied.

Public policy strongly favors arbitration. Our supreme court recently reaffirmed this policy, noting that "[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Carolina Care Plan, Inc. v. United Healthcare Services, Inc., 2004 WL 2377630, S.C. Sup Ct. Op No. 25879 (October 18, 2004). Likewise, in their latest pronouncement regarding arbitration, the United States Supreme Court held that Congress's unmistakable intent underlying the "involving commerce" language of the Federal Arbitration Act (FAA) was designed to allow the "broadest permissible exercise of Congress's commerce clause power." Citizens Bank v. Alfabco, Inc., 123 S.Ct. 2037, 2039 (2003) (per curiam).

The issues raised in the Carolina Care Plan and Alfabco cases, however, involved whether a particular dispute was arbitrable under the parties' arbitration agreement.

By contrast, in the case at hand the question addressed by the courts October 26, 2004 order was whether the agreement to arbitrate was itself enforceable at all. And while "there is strong presumption in favor of the validity of arbitration agreements", arbitration is "available only when the parties involved contractually agree to arbitrate." Towles v. United Health Care Corp. 338 S.C. 29, 37, 524 S.E.2d 839 (Ct.App. 1999).

The idea of arbitration is premised on consent, and the pro-arbitration presumptions and policies were designed to further the intent of private parties who had consensually agreed to arbitrate their disputes. Indeed, the FAA was primarily aimed at reversing the common law hostility to arbitration. In enacting the FAA, Congress meant to place arbitration agreements "upon the same footing as other contracts." Volt Information Sciences, Inc. v. Stanford, 489 U.S. 468, 478 (1989). The FAA thus makes arbitration agreements as enforceable as other contracts, "but not more so." Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967). The FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds or exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Courts apply ordinary state-law principles governing the formation of contracts in determining whether a valid arbitration agreement exists. Housing Authority of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 335, 588 S.E.2d 617 (Ct. App. 2003).

Defendant asserts that 9 U.S.C. § 5 can be invoked to save the parties' agreement. Defendant reasons that the dominant intent of the parties was to arbitrate their dispute, and the references to AAA denote subsidiary details. While this argument is alluring, the plain language of Section 5 prevents its use in this instance. Section 5, which is titled "Appointment of Arbitrators or Umpires," states:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Here, there has not been "a lapse in the naming of an arbitrator . . ."; rather, the parties' agreement as to the rules and forum for the arbitration has lapsed. The court has little choice but to assume the parties meant what they said when they contracted to arbitrate "pursuant to the rules of the American Arbitration Association." Had the parties not included this language in their agreement, the court could appropriately apply Section 5 to appoint an arbitrator on motion in the event the parties could not agree upon one.

In essence, Defendant seeks to have this court delete the phrase "pursuant to the rules of the American Arbitration Association." In order to do so, the court would have to find that this phrase was superfluous and incidental to the parties'

arbitration agreement. This the court cannot do. Rather than consisting of a mere "ancillary logistical concern," the parties' express intent that their arbitration be governed by the expansive rules of the AAA was central to their agreement. See In Re Salomon, Inc. Shareholders' Derivative Litigation, 68 F.3d 554, 561 (2d Cir. 1995) (parties' agreement to arbitrate "in accordance with" the constitution and rules of the NYSE signaled that the dominant intent of the parties was to arbitrate in a particular forum; where the NYSE refused to arbitrate the parties' dispute, the entire arbitration provision fails and 9 U.S.C. § 5 cannot be invoked to revive it).

The significance of the agreement to abide by AAA Rules may be illustrated by following Defendant's argument to its logical ends. Were the court to compel arbitration, the parties would proceed to agree on an arbitrator or arbitrators. Absent agreement, the court on motion of one of the parties could then employ 9 U.S.C. § 5 to appoint an arbitrator (or a panel of three arbitrators at the election of a party). The arbitration would proceed, and the limited discovery rules and witness conditions contained in the agreement would presumably apply. The arbitrator(s) would then hear the case, but without the benefit of any other proscribed rules or framework.¹ The parties would be left to resolve their dispute on a field of unknown boundaries. They would be confronted with a pervasive unpredictability as to what "rules" would govern

¹The parties obviously could still agree to follow their own rules, but the speculative possibility of such future agreement is inadequate to constitute the mutual assent necessary for an enforceable contract. Ellis v. Taylor, 316 S.C. 245, 449 S.E.2d 487 (1994) (contract provision leaving material terms open for future agreement is void for indefiniteness.)

the arbitration hearing itself, an uncertainty that would likely spawn additional litigation and frustrate finality.² Such results would be contrary to the interests of justice, the underlying policy goals of arbitration, and, of course, the parties' manifest intent.

It would strain credulity to find that once the parties' chosen rules for the arbitration no longer existed, there still somehow remained a mutual assent to arbitrate. Simply put, once the rule and forum provisions failed, there was no longer a meeting of the minds as to all the essential and material terms. Player v. Chandler, 299 S.C. 101, 382 S.E.2d 891 (1989) (for contract to be valid and enforceable, there must be a meeting of the minds as to all essential and material terms).

The undisputed fact that AAA is no longer an available forum for the parties' arbitration renders the entire agreement uncertain and, therefore, unenforceable. See Prestwick Golf Club, Inc. v. Prestwick Ltd. Partnership, 331 S.C. 385, 390, 503 S.E.2d 184 (1998) ("The requirements of certainty in contracts ensure that the parties intend to conclude a binding agreement."); King v. Oxford, 282 S.C. 307, 316, 318 S.E.2d 125 (Ct. App. 1984).

² It could be argued that the FAA provides some basic rules concerning the procedure of an arbitration. See 9 U.S.C. § 7, 9-11 (establishing inter alia, witness rules, fees, and award procedures). Yet the very paucity of these procedures highlights again the importance of the parties' designation that AAA rules apply. As the court noted in its earlier order, AAA rules are quite detailed and confer substantial rights upon the parties in various areas, many of which the FAA either does not allow or even address. For example, AAA rules allow the parties the right to subpoena; the FAA grants that power only to the arbitrator. 9 U.S.C. § 7. The AAA rules also delineate rules regarding pleadings, amendments of pleadings, pre-trial conferences, the right to counsel, evidence, and various deadlines. See Commercial Arbitration Rules of the American Arbitration Association.

CONCLUSION

Based on the foregoing analysis and authorities, the Defendant's Motion for Reconsideration is DENIED.

IT IS SO ORDERED.

D. Garrison Hill

D. GARRISON HILL
PRESIDING JUDGE
THIRTEENTH JUDICIAL CIRCUIT

November 17, 2004
Greenville, South Carolina

Exhibit 19



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Transcript of:
Sally Dobson

Date: May 5, 2011

Case: Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

Case No.: 2010-25-CP-491 & 492

Name of Court Reporter: Christina L. Richardson
Notary Public for South Carolina

Sally Dobson -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

Page 1	Page 3
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS) CASE NO.: 2010-CP-25-491&492 COUNTY OF HAMPTON) Cherry Scott as Personal) Representative of the Estate) of Elizabeth Jones,)) VIDEO DEPOSITION PLAINTIFF,)) OF VS.)) Sally Dobson Heritage Healthcare of the) Estill, LLC, d/b/a Heritage of) the Lowcountry and/or d/b/a) Uni-Health Post Acute Care of) the Lowcountry, United) Clinical Services, Inc.,) United Rehab, Inc., and UHS-) Pruthi Corporation,)) DEFENDANTS,)) Video deposition of Sally Dobson, taken before Christina L. Richardson, a Notary Public in and for the State of South Carolina, commencing at the hour of 2:10 p.m., May 5, 2011, at the office of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., 101 Mulberry Street East, Hampton, South Carolina. REPORTED BY CHRISTINA L. RICHARDSON	1 INDEX OF EXAMINATION 2 STIPULATIONS.....4 3 DIRECT EXAMINATION BY MR. COPE.....5 4 CERTIFICATE.....20 5 6 INDEX OF EXHIBITS 7 8 A. Resident and Facility Arbitration Agreement 9 Elizabeth Jones, signed by Ellen Jenkins.....17 10 11 12 13 14 15 16 17 18 19 20 21 *DIGITALLY RECORDED AUDIO RETAINED FOR TWELVE (12) MONTHS 22 FROM DATE OF CERTIFICATION, 23 24 25
Page 2	Page 4
1 APPEARANCES 2 FOR THE PLAINTIFF 3 Lee D. Cope, Esq. 4 Peters, Murdaugh, Eltzroth, & Detrick, P.A. 5 Post Office Box 457 6 101 Mulberry Street East 7 Hampton, South Carolina 29924 8 9 Charles J. McCutchen, Esq. 10 Lanier & Burroughs, LLC 11 Post Office Drawer 2789 12 Orangeburg, South Carolina 29116 13 14 FOR THE DEFENDANT 15 W. Jerad Rissler, Esq. 16 Arnall, Golden, Gregory, LLP 17 171 17th Street, NW 18 Suite 2100 19 Atlanta, Georgia 30363-1031 20 21 REPORTED & VIDEOTAPED BY 22 Christina L. Richardson 23 Co-Star Reporting 24 102 Waters Edge Road 25 Hampton, South Carolina 29924	1 STIPULATIONS 2 It is stipulated by and between counsel for 3 the respective parties that all objections are reserved 4 until the time of trial, except as to the form of the 5 questions. 6 This deposition is being taken pursuant to 7 the South Carolina Rules of Civil Procedure. 8 9 The reading and signing of this deposition is 10 WAIVED by the deponent and counsel for the respective 11 parties. 12 MR. COPE: Okay. We've agreed to take Ms. 13 Sally Dobson's deposition for the limited purposes 14 of her involvement with the admission and 15 arbitration issues in the Cherry Scott case. By 16 taking her deposition today we're not waiving our 17 rights should we be allowed to proceed with 18 litigation or if the Defendant does not move to 19 compel arbitration that we would be allowed to 20 take her deposition again if necessary on the 21 merits of the case. 22 MR. RISSLER: We agree. 23 THE VIDEOGRAPHER: Going on the video record 24 now. 25

1 (Pages 1 to 4)

Page 5	Page 7
1 WHEREUPON, Sally Dobson, being duly sworn and 2 cautioned to speak the truth, the whole truth, and 3 nothing but the truth, testified and deposed as 4 follows: 5 DIRECT EXAMINATION 6 BY MR. COPE: 7 Q Would you state your full name for the record, please? 8 A Sally Stanley Dobson. 9 Q And your address? 10 A 300 West Elm Street, Hampton, South Carolina. 11 Q And you are employed by the -- by the nursing home in 12 Estill. What's the name of your employer? 13 A Uni-Health Post Acute Care of the Low Country. 14 Q Okay. I want to ask you some questions today about 15 part of your job duties and responsibilities as I 16 understand that that is with the admission process? 17 A Uh-huh (affirmative). 18 Q Are you involved in that? 19 A I am. 20 Q Tell me about your level of involvement with the 21 admission process of a new resident. 22 A I am the admissions director. I take referrals from 23 the hospital or from home. We go over them, we check 24 the pay sources, and then if we can help these people 25 or can admit them for care then we do the process of	1 MR. COPE: I wasn't trying. 2 Q But would you let me admit Mr. Rissler into a nursing 3 home? 4 A Can y'all admit me? 5 Q But do you understand my question, Ms. Dobson? 6 A Uh-huh (affirmative). Yes, I do. 7 Q Do you even take that into consideration or is it just 8 you deal with the family members that are present? 9 A I deal with the family members that are present and 10 have been taking care of this -- the parent or the 11 sister or brother. 12 Q Okay. Do you require that they provide you with a copy 13 of a Power of Attorney? 14 A If they have a copy of the Power of Attorney we ask 15 that we get a copy of it. 16 Q Okay. Tell me how you explain the documents to them. 17 A I go sheet by sheet and tell them what they are about 18 to sign. If they refuse to sign it, I mark through it 19 and put "refused to sign," I initial it and then have 20 them initial it. 21 Q So if they don't understand something you explain it to 22 them? 23 A Yes. 24 Q In detail? 25 A Yes.
Page 6	Page 8
1 admitting them. 2 Q Okay. What is your involvement in the actual admission 3 process itself? 4 A I sign -- I have the paperwork signed by either the 5 patient or a family member. 6 Q Okay. Are you familiar with what family members can 7 enter into contract agreements for the resident? 8 A Most of the family members that I have come in contact 9 with who have been taken care of, like the mother or 10 the father, is a daughter, son, sometimes a sister, a 11 brother. 12 Q Are you aware of whether or not someone that does not 13 have a Power of Attorney has the legal ability to enter 14 into a contract for somebody else? 15 MR. RISSLER: Object to the form. 16 Q Do you understand my question? 17 A No. 18 Q If -- are you aware of any legal requirements that must 19 be met, for example, for me to admit Mr. Rissler into a 20 nursing home? 21 A No. 22 Q Okay. 23 MR. RISSLER: Object to the form. And object 24 to you trying to have me admitted. 25 THE DEPONENT: [Laughs.]	1 Q Because they have to make an informed consent before it 2 can be binding, right? 3 A Correct. 4 Q Okay. What is an Arbitration Agreement? 5 A It is an agreement that if they have any concerns or 6 complaints, that are not being taken care of in a 7 timely manner, they have the right to an arbitration. 8 Q Okay. 9 A When they sign the Arbitration Agreement that waives 10 their right to a jury trial or, you know, having it in 11 court. 12 Q Okay. 13 A They are informed of this whenever they are there to 14 sign. 15 Q How does the arbitration -- tell me how an arbitration 16 occurs? Because I assume they want to know that. I 17 mean, what is an arbitration? 18 A Most of them don't want to know it. 19 Q Well, what is it? 20 A I mean they -- they just -- they either say, "I don't 21 understand what you're talking about," and then we read 22 over the Arbitration Agreement. And then if they want 23 to sign it and agree to sign, they will sign it. 24 Q Well, because you said that it's got to a knowing, an 25 understanding, I assume you understand what's --

Page 9	Page 11
1 A Uh-huh (affirmative). 2 Q -- an Arbitration Agreement don't you? 3 A Uh-huh (affirmative). 4 Q Is that a "yes"? 5 A Yes, sir. I'm -- 6 Q Okay. 7 A -- sorry. 8 Q So tell me how an arbitration proceeding occurs. 9 MR. RISSLER: Object to the form. 10 Q Since that's what you're -- you're giving up your jury 11 trial in lieu of an arbitration proceeding. I assume 12 you have to understand what that is before you can 13 expect a person signing to understand it, right? 14 A Correct. 15 Q So tell me, what is an arbitration proceeding? 16 A It's -- well, let's see. I really don't know how to 17 explain it to you. 18 Q Well, try as best you can. 19 A Okay. It is where -- 20 Q Well, let me ask you, because if you don't know how to 21 explain it, how do you explain it to -- 22 A Well, I read it -- 23 Q -- patient? 24 A -- to them. 25 Q I understand, but you've already told me there's some	1 Q -- is exactly what you tell them? 2 A Uh-huh (affirmative). 3 Q Is that a "yes"? 4 A Yes, sir. 5 Q Okay. Because you've already got the form filled out 6 for them, right? 7 A That's correct. 8 Q You put a little check next to where they have to sign? 9 A Yes. 10 Q Okay. And you don't read over the form every time to 11 them, do you? 12 A No, sir. 13 Q Have you ever told them about any limitations in the 14 Arbitration Agreement? 15 A Not to my knowledge, no, sir. 16 Q Well, have you ever told them about any issues with the 17 arbitration rules that would be applied -- 18 A No, sir. 19 Q -- under these agreements? 20 A No, sir. 21 Q Are you aware of any? 22 A No, sir. 23 Q Did you know, Ms. Dobson, that the Arbitration 24 Agreement that we're here about today contains a 25 provision that the American Arbitration Association
Page 10	Page 12
1 things they don't -- they may not understand -- 2 A Uh-huh (affirmative). 3 Q -- right? 4 A Correct. 5 Q And so you would be the one that has to explain it to 6 them, right? 7 A Correct. I would -- 8 MR. RISSLER: Object to the form. 9 Q Yeah. 10 A I would get somebody else to explain it to them. 11 Q Who else explains it to them? 12 A I can get my administrator to explain it. 13 Q Has he ever explained to you what an arbitration 14 proceeding -- 15 A Yes. 16 Q -- entails? 17 A Yes, he has. 18 Q And what has he told you? 19 A Well, he just tells me that it is an agreement that if 20 they have any complaints or any concerns that are not 21 being taken care of in a timely manner then we can go 22 into arbitration. 23 Q So when you go over the form that's -- what you just 24 told me -- 25 A Uh-huh (affirmative).	1 rules have to be followed? Were you aware of that? 2 A If it's on that sheet of paper, Well, I don't know what 3 the Arbitration Agreements are. 4 Q Well, how is it if you don't know, how would a resident 5 know or their family member? 6 A I don't know. 7 Q Well, don't you think that's an important part of it? 8 A It is. 9 Q It's a material part of the contract? 10 A It is. 11 Q And but you don't know what it is? 12 A But I don't know what it is. 13 Q And so you can't expect a resident to know? 14 A That's -- 15 MR. RISSLER: Object to the form. 16 A -- correct. 17 Q Or their personal representative? 18 A Uh-huh (affirmative). 19 Q Right? 20 A Right. 21 Q Or power of attorney, right? 22 A Right. 23 Q Or their family member? 24 A Right. 25 Q Okay. Are you aware -- Well, do you know what the AAA

3 (Pages 9 to 12)

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Page 13	Page 15
1 is? 2 A No, I don't. 3 Q Okay. Do you know what the fee schedule is for the 4 American Arbitration Association when you use their 5 rules to arbitrate a dispute? 6 A No, I don't. 7 Q Are there certain matters between the nursing home and 8 the resident or their family member that may not fall 9 under the arbitration agreement? 10 A I don't know. 11 Q Well, doesn't the family need to know that when they 12 sign this? 13 A I would think so, yes, sir. 14 Q But you're not aware? 15 A I'm not aware. 16 Q And you're the only person that meets with them to go 17 over these documents, correct? 18 A Yes, sir. 19 Q You've been over the document for the admission of Ms. 20 Elizabeth Jones? 21 A Yes. 22 Q You looked at it prior to the deposition beginning 23 today, haven't you? 24 A Yes. 25 Q Did you see anything in there that you didn't	1 MR. RISSLER: Object to the form. 2 Q Right. 3 A I don't know. I -- I don't -- 4 Q Well, if that's -- if I'm right -- 5 A Okay, if you're right. 6 Q If I'm right that they took the position in January of 7 2003 that they would no longer recognize as 8 arbitrations before them an Arbitration Agreement that 9 was signed before the injury that gave rise to the 10 dispute, don't you think that residents and their 11 family members and power of attorney should be advised 12 of that? 13 MR. RISSLER: Object to the form. 14 A I don't know. 15 Q Wouldn't you have wanted to that before you had 16 somebody sign that? 17 A I would think so, yes, sir. 18 Q Don't you think the right to a jury trial is a 19 substantial right? 20 MR. RISSLER: Object to the form. 21 A I -- I don't agree jury trials. 22 Q And do you agree with the constitution that provides -- 23 A Oh, yes -- 24 Q -- for it? 25 A -- I do. But...
Page 14	Page 16
1 understand in the Arbitration Agreement? 2 A I don't think so. 3 Q Okay. Has anyone ever told you that the American 4 Arbitration Association, which is -- which you'll see 5 in a moment, is a part of the Arbitration Agreement 6 that you signed off on. They initiated a policy in 7 January of 2003 that they would not recognize 8 Arbitration Agreements unless it was signed after an 9 injury giving rise to an arbitration dispute. 10 MR. RISSLER: Object to the form. 11 Q Were you aware of that? 12 A No, sir. 13 Q Do you think patient's should be aware of that -- 14 MR. RISSLER: Object to the form. 15 Q -- if they -- 16 A Yes, sir. 17 Q -- signed this? You do? 18 A (Nods head up and down in an affirmative response.) 19 Q But you weren't aware of that? 20 A I was not aware of that. 21 Q And so for every one you've ever had a patient or a 22 resident or a family sign, if it contained the American 23 Arbitration Association rule requirement, they should 24 know that that the American Arbitration Association 25 does not favor pre-dispute Arbitration Agreements?	1 Q Why don't you agree with jury trials, Ms. Dobson? 2 MR. RISSLER: Object to the form. 3 A Well, it's not always a -- I mean it's not all of the 4 time, you know, but I feel like that some things are -- 5 I don't know. I don't know. 6 Q Well, who would be the arbitrator if there was a 7 dispute between a resident and the nursing home? 8 A Who would be the arbitrator? 9 Q Yeah. 10 MR. RISSLER: Object to the form. 11 A Well, one would be assigned? 12 Q By who? 13 A I don't know. 14 Q Well, how are you advising people to sign this if you 15 don't even know how it's going to work out? 16 A I don't know. 17 Q It doesn't seem fair does it? 18 A Uh-huh (affirmative). 19 MR. RISSLER: Object to the form. 20 A No. 21 MR. COPE: Let's take a quick break. 22 THE DEPONENT: Okay. 23 MR. COPE: Okay. 24 (Whereupon, off the record at 2:22 p.m.; 25 back on the record at 2:23 p.m.)

Page 17 1 Q I want to hand you what has already been marked Exhibit 2 A to your deposition, which is an Arbitration 3 Agreement, and ask you if you recognize that document? 4 (Whereupon, Defendant's/Plaintiff's Exhibit 5 No. A was marked for identification.) 6 A Yes, I do. 7 Q And on page one of Exhibit A, is that your handwriting 8 where you wrote in Ellen Jenkins? 9 A Yes, it is. 10 Q And do you know whether or not Ms. Ellen Jenkins had 11 Power of Attorney over her sister? 12 A No, I do not. 13 Q How do you determine whether or not the resident has 14 the right state of mind to sign this herself? 15 A Repeat the question. 16 Q How do you determine whether or not the resident has 17 the mental capacity to enter into this contract them 18 self? 19 A We have a mini-mental state exam done, usually before a 20 patient is admitted to the nursing facility, and the 21 nursing staff at the hospitals usually do this, and if 22 they score below 20 or less then they do not have the 23 mental capacity to -- 24 Q Okay. 25 A -- sign documents.	Page 19 1 2 THE DEPONENT WAIVED THE READING 3 AND SIGNING OF THE DEPOSITION. 4 5 (*This transcript may contain quoted material. 6 Such material is reproduced as read or quoted by the 7 speaker.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
Page 18 1 Q And do you know if that's the case with Ms. Elizabeth 2 Jones? 3 A I don't know. 4 Q Have you gone back and checked? 5 A No, I have not. 6 Q Okay. If she had the mental capacity would it have 7 been more appropriate for you to go to her? 8 A Yes -- 9 MR. RISSLER: Object -- 10 A -- sir. 11 MR. RISSLER: -- to the form. 12 Q Okay. 13 MR. COPE: Those are all the questions I have 14 Ms. Dobson. 15 THE DEPONENT: Yes, sir. 16 MR. COPE: Thank you. Yes, me/am. Well, if 17 you want me to think about it, I'll see if I can 18 come up with some more. 19 THE DEPONENT: That's all right. 20 MR. COPE: Jerad? 21 MR. RISSLER: I got no questions. 22 MR. COPE: Okay. 23 24 WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE 25 DEPOSITION IS CONCLUDED AT 2:25 P.M.	Page 20 1 STATE OF SOUTH CAROLINA) 2) CERTIFICATE 3 COUNTY OF HAMPTON) 4 5 Be it known that I took the foregoing video 6 deposition of Sally Dobson; 7 8 That I was then and there a Notary Public in and 9 for the State of South Carolina-At-Large; 10 That by virtue thereof I was duly authorized to 11 administer an oath; 12 13 That the witness was by me first duly sworn or 14 affirmed to testify the truth, the whole truth, and 15 nothing but the truth, concerning the matter in 16 controversy aforesaid; 17 The foregoing transcript represents a true, 18 accurate and complete transcript of the testimony given 19 by said deponent after first being duly sworn, at the 20 time and place aforesaid, to the best of my skill and 21 ability; said deposition was reported by method of 22 Stenomask utilizing speech recognition with digital 23 backup. This transcript may contain quoted material; 24 said material is transcribed as read or quoted by the 25 speaker. I further certify that I am neither employed by nor related to any of the parties in this matter nor their counsel; nor do I have any interest, financial or otherwise, in the outcome of this action. IN WITNESS WHEREOF I have hereunto set my hand and seal this 27th day of June, 2010. 22 23 24 25 Christina L. Richardson Professional Court Reporter Notary in and for the State of South Carolina My Commission Expires: May 26, 2015

Exhibit 20



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Transcript of: **Ellen Jenkins**

Date: May 5, 2011

Case: Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

Case No.: 2010-CP-25-491 & 492

Name of Court Reporter: Christina L. Richardson
Notary Public for South Carolina

Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

Page 1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS CASE NO. 2010-CP-25-491&492 COUNTY OF HAMPTON) Cherry Scott as Personal) Representative of the Estate) of Elizabeth Jones,) DEPOSITION PLAINTIFF,) OF VS.) Ellen Jenkins Heritage Healthcare of the) Estill, LLC, d/b/a Heritage of) the Lowcountry and/or d/b/a) Uni-Health Post Acute Care of) the Lowcountry, United) Clinical Services, Inc.,) United Rehab, Inc., and UHS-) Pruitt Corporation) DEFENDANT.) Deposition of Ellen Jenkins, taken before Christina L. Richardson, a Notary Public in and for the State of South Carolina, commencing at the hour of 1:43 p.m., May 5, 2011, at the office of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., 101 Mulberry Street East, Hampton, South Carolina. REPORTED BY CHRISTINA L. RICHARDSON	Page 3 1 INDEX OF EXAMINATION 2 STIPULATIONS 4 3 DIRECT EXAMINATION BY MR. RISSLER..... 5 4 CROSS-EXAMINATION BY MR. COPE..... 15 5 REDIRECT EXAMINATION BY MR. RISSLER..... 16 6 RECROSS-EXAMINATION BY MR. COPE..... 16 7 REDIRECT EXAMINATION BY MR. RISSLER..... 17 8 CERTIFICATE..... 19 9 10 INDEX OF EXHIBITS 11 DEFENDANT'S 12 1 Resident and Facility Arbitration Agreement 13 for Elizabeth Jones, signed by Ellen Jenkins..... 13 14 15 16 17 18 19 20 21 *DIGITALLY RECORDED AUDIO RETAINED FOR TWELVE (12) MONTHS 22 FROM DATE OF CERTIFICATION. 23 24 25
Page 2 1 APPEARANCES 2 FOR THE PLAINTIFF 3 Lee D. Cope, Esq. 4 Matthew V. Creech, Esq. 5 Peters, Murdaugh, Eltzroth, & Detrick, P.A. 6 Post Office Box 457 7 101 Mulberry Street East 8 Hampton, South Carolina 29924 9 Charles J. McCutchen, Esq. 10 Lanier & Burroughs, LLC 11 Post Office Drawer 2789 12 Orangeburg, South Carolina 29116 13 14 FOR THE DEFENDANT 15 W. Jerad Rissler, Esq. 16 Arnall, Golden, Gregory, LLP 17 171 17th Street, NW 18 Suite 2100 19 Atlanta, Georgia 30363-1031 20 21 REPORTED BY 22 Christina L. Richardson 23 Co-Star Reporting 24 102 Waters Edge Road 25 Hampton, South Carolina 29924	Page 4 1 STIPULATIONS 2 It is stipulated by and between counsel for 3 the respective parties that all objections are reserved 4 until the time of trial, except as to the form of the 5 questions. 6 This deposition is being taken pursuant to 7 the South Carolina Rules of Civil Procedure. 8 9 The reading and signing of this deposition is 10 WAIVED by the deponent and counsel for the respective 11 parties. 12 MR. COPE: By agreement of all the counsel, 13 we're allowing the Defendants to take the 14 deposition of Ms. Jenkins for the limited purpose 15 of going over the Arbitration Agreement in this 16 case. By doing so we are not going to hold -- 17 should the Defendants file a Motion to Compel 18 Arbitration and then lose that and we end up -- or 19 stay in litigation, so long as their questions 20 today are limited solely to the Arbitration 21 Agreement issues we will not attempt to block them 22 from retaking Ms. Jenkins' deposition about 23 substantive matters at a later time. 24 WHEREUPON, Ellen Jenkins, being duly 25 sworn and cautioned to speak the truth, the whole

1 (Pages 1 to 4)

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ROA-419

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1 truth, and nothing but the truth, testified and 2 deposed as follows: 3 DIRECT EXAMINATION 4 BY MR. RISSLER: 5 Q Ms. Jenkins, my name is Jerad Rissler and I'm the 6 lawyer representing Heritage Healthcare of Estill, LLC, 7 which is the operator of the nursing home where your 8 sister, Elizabeth Jones, resided. I also represent the 9 other Defendants in this case: United Clinical, United 10 Rehab, and UHS-Pruitt Corporation. I'm going to be 11 taking your deposition today, which means I'll be 12 asking questions in trying to get information from you 13 what you know about, in this case, limited to the 14 Arbitration Agreement. I'm going to do the best I can 15 to ask questions clearly. If I do a bad job of that 16 and there's a question that I ask that you don't 17 understand, would you let me know that so I can 18 rephrase it for you? 19 A Yes. 20 Q Okay. All right. And as you can see, the court 21 reporter is going to be taking down your testimony so 22 that we can read it later, and so she needs you to give 23 verbal responses instead of you nodding your head yes 24 or shaking your head no. If you can give a verbal 25 response that's going to help her out a lot.	1 today? 2 A Oh, did I talk any -- no. 3 Q Okay. Did you review any documents to prepare for your 4 deposition? 5 A Oh, yes. 6 Q What documents did you review? 7 A I'm not -- I'm not sure. 8 Q Okay. And can you tell me about your educational 9 history? 10 A Tenth grade. 11 Q Okay. 12 A I went as far as the tenth grade. 13 Q Okay. Did you have any schooling after the tenth 14 grade? Did you get your GED or any other schooling or 15 training? 16 A No. 17 Q Can you read and write? 18 A Yes. 19 Q All right. And you are the sister of Elizabeth Jones? 20 A Yes. 21 Q And I understand that Cherry Scott is also a sister of 22 Elizabeth Jones? 23 A Yes. 24 Q Okay. At the time Ms. Jones was admitted to Heritage 25 of Estill, did she have any other living siblings?
Page 6	Page 8
1 A Yes. 2 Q Okay. All right. And I'm going to do my best not to 3 interrupt you if you're in the middle of your answer, 4 and I would ask that you let me finish my question 5 before you start your answer, and that way we're not 6 talking over each other and that also will make it 7 easier for the court reporter. 8 A Okay. 9 Q All right. And you understand that you're under oath 10 today? 11 A Yes. 12 Q Okay. And that's the same oath that you would be under 13 if you were testifying in court? 14 A Yes. 15 Q What did you do to prepare for your deposition today? 16 A How do you mean? 17 Q Did you meet with anyone to prepare for your 18 deposition? 19 A Well I'm here now. 20 Q Did -- 21 A I mean... 22 Q Did you meet with anyone to prepare for your 23 deposition? 24 A But like I say, as in...? 25 Q Did you talk with anybody about -- about your testimony	1 A Oh, yes. 2 Q Okay. Can you give me their names? 3 A Levy Tyson, Carlene Jones, well Cherry Scott, and 4 myself, Ellen Jenkins. 5 Q Okay. 6 A That's five? How many did I give you? 7 Q You gave me yourself, Ms. Jenkins, a Tyson... I didn't 8 get the first name? 9 A Larcenia. 10 Q Okay. And then another Jones. 11 A Yes. That's five, with myself? 12 Q Yeah, I got five including -- 13 A Myself. 14 Q -- Ms. Elizabeth Jones, okay. All right. And I 15 understand that you signed the paperwork to admit Ms. 16 Jones to Heritage of Estill? 17 A Yes. 18 Q Okay. Do you know where she was being admitted from? 19 In other words, from the hospital or from home? 20 A The hospital. 21 Q Had you discussed with Elizabeth Jones her admission to 22 Heritage of Estill? 23 A Yes. 24 Q And what did you discuss with her? 25 A To let her know that she was going to be there for a

Page 9	Page 11
1 little while for therapy. 2 Q Okay. Did she understand that you were going to be 3 signing her in to Heritage of Estill? 4 A Only for that purpose, yes. 5 Q And when you say "only for that purpose," what -- what 6 do you mean by "that purpose"? 7 A When she was going in for therapy and I guess whatever 8 else they would have to prepare for her, but just in 9 for therapy she know that part because it was good. 10 Q All right. And she understood that you were going to 11 be the one who signed her in for the admission to 12 Heritage of Estill? 13 MR. COPE: Object to the form. 14 A Yes. 15 Q All right. Did you discuss her admission to Heritage 16 of Estill with any other family members? 17 A Yes. 18 Q Okay. And who did you discuss it with? 19 A My sister. 20 Q Well, my sisters and brother. 21 Q Okay. And they understood that you were going to be 22 signing the paperwork to admit your sister to Heritage 23 of Estill? 24 A Yes. 25 MR. COPE: Note my objection before she	1 to her about the admission to Heritage of Estill? 2 A For -- yeah, to get -- 3 Q Okay. 4 A -- her therapy, yes. 5 Q All right. Did you talk to her about that while she 6 was in the hospital? 7 A Oh, yes. 8 Q Okay. And while she was in the hospital she understood 9 that you were going to sign her into Heritage of 10 Estill? 11 A Oh, yes. 12 Q All right. And did she give you any instructions about 13 her admission to Heritage of Estill? 14 A Well I told her, you know, for her therapy, you know, 15 because she was doing good and then she went in there 16 for more therapy and my daughter -- well, I was working 17 and my daughter was in school, so it was just for a 18 little while. 19 Q Okay. And who did you meet with to get your mother or 20 excuse me, your sister admitted to Heritage of Estill? 21 A I think the lady's name Ms. Sally, I think. 22 Q Sally Dobson? 23 A That sounds like the name. 24 Q Okay. Did -- had you met her before the day that you 25 admitted Ms. Jones to Heritage of Estill?
Page 10	Page 12
1 responded. 2 Q Did anyone object to you being the one to sign your 3 sister into Heritage of Estill? 4 MR. COPE: Object to the form. 5 A Because I don't understand that. 6 Q Okay. Did -- let me ask you first: Did Ms. Jones ever 7 tell you that she didn't want you to be the one to sign 8 her into Heritage of Estill? 9 MR. COPE: Object to the form. 10 A I don't -- I don't understand that part either. 11 Q Okay. Ms. Jones understood that you were going to be 12 the one to sign her into Heritage of Estill? 13 MR. COPE: Object to the form. 14 A Well, she understood that part. 15 Q Okay. Did she -- did Ms. Jones give you any 16 instructions about signing her into Heritage of Estill? 17 MR. COPE: Object to the form. 18 A How you mean? 19 Q Did she tell you either things that she wanted you to 20 do or things that she didn't want you to do about -- 21 A Oh. 22 Q -- signing her into Heritage of Estill? 23 MR. COPE: Object to the form. 24 A I don't understand what you're say now since... 25 Q Okay. Did you -- I think you had said that you talked	1 A No. 2 Q That was the first time that you had met her? 3 A Yes. 4 Q When did you meet with her? 5 A I can't think back to the date. 6 Q Okay. In other words, did you meet with her before 7 your sister was admitted to Heritage of Estill or did 8 you meet with her on the same day or did you meet with 9 her sometime after? 10 A I'm not sure, because I know I met with her. 11 Q Okay. But you don't recall when it was in relation to 12 -- 13 A I can't recall right now. 14 Q Okay. Do you recall anything about the admissions 15 process? 16 A Like...? Can you explain it a little bit? 17 Q Okay. Did you have a meeting with Ms. Sally Dobson 18 about Ms. Jones' admission to Heritage of Estill? 19 A Oh, like, did I talk to her? 20 Q Yes. 21 A When I got there, yes. 22 Q Okay. And was that in Ms. Dobson's office? 23 A Well it was in a office and I take it was hers. 24 Q Okay, fair enough. Do you remember anything that you 25 talked about with Ms. Dobson about the admission?

Page 13 1 A Just signing her in -- 2 Q Okay. 3 A -- that I can remember. 4 Q Do you recall having any discussions about any of the 5 documents that you signed? 6 A The only thing I recall was me signing her in, that's 7 what I recall. 8 Q All right. Do you recall anything specific about what 9 you signed? 10 A Just signing her in, that was it. 11 Q Okay. Do you remember if you had any questions for Mr. 12 Dobson about any of the paperwork that you signed? 13 A It was, basically, simple. I just, you know, had to 14 sign her in and that was like, basically, it. 15 Q All right. Were you given a copy of all the documents 16 that you signed? 17 A I'm not sure. 18 Q Okay. And I'm going to ask the court reporter to hand 19 you the document that's marked as Exhibit I. Actually, 20 I'll hand it to you. 21 (Whereupon, Defendant's Exhibit No. 1 22 was marked for identification.) 23 Q Do you recognize that document? 24 A No, sir. 25 Q Okay. If you'll turn to the second page of that for	Page 15 1 Q Right. But on the second page that is your signature, 2 right? 3 A That's just my signature. 4 Q Okay. Just to make sure I'm clear, you don't recall 5 having any discussions with anybody about this document 6 at the time that you signed? 7 A No, sir. 8 MR. RISSLER: Those are all the questions 9 I've got. 10 CROSS-EXAMINATION 11 BY MR. COPE: 12 Q Ms. Jenkins, you were never appointed as the Power of 13 Attorney for your sister, were you? 14 A Never. 15 Q Never had the legal authority to sign documents on her 16 behalf? 17 MR. RISSLER: Object -- 18 A I never did. 19 MR. RISSLER: -- to the form. 20 Q Okay. Thank you. 21 A Never did. 22 MR. RISSLER: Let me just follow up on that. 23 24 25
Page 14 1 me. 2 A (Witness Complies.) 3 Q Is that your signature there close to the bottom of the 4 second page? 5 A Close to the bottom as in the second line? 6 Q The second -- yeah, the second line that has 7 handwriting on it. Is that your signature? 8 A That second line is my signature. 9 Q Okay. All right. Do you recall this document at all? 10 A Unh-unh (negative). 11 Q Okay. 12 A I don't recall seeing this, but that's my signature. 13 Q Okay. Do you recall, at the meeting that you had with 14 Ms. Dobson -- 15 A Uh-huh (affirmative). 16 Q -- whether you discussed an Arbitration Agreement? 17 A I don't remember hearing that word at all. Unh-unh 18 (negative). 19 Q Do you recall if you read this document before you 20 signed it? 21 A I know it wasn't nothing but this here on it. 22 Arbitration Agreement, now I don't remember that at 23 all. 24 Q Okay. So you don't recall it? 25 A I don't remember that at all.	Page 16 1 REDIRECT EXAMINATION 2 BY MR. RISSLER: 3 Q At the time that you signed this Arbitration Agreement 4 do you know if any -- if Ms. Jones had given a Power of 5 Attorney to anyone else to act on her behalf? 6 A First of all, this is my signature, but this paper with 7 this here on it, and I don't recall this at all. 8 Q Okay. 9 A But this is my signature. 10 MR. COPE: And you're referring to page one 11 of Exhibit I? 12 THE DEPONENT: Yes. 13 MR. COPE: Okay. 14 THE DEPONENT: I didn't see that at all and 15 that's not my printing. I don't write like that. 16 Q Okay. As of this date, the date that Ms. Jones was 17 admitted to Heritage of Estill, do you know if anyone 18 held a Power of Attorney to act on her behalf? 19 A I don't know, no. I don't no. 20 Q All right. 21 RECROSS-EXAMINATION 22 BY MR. COPE: 23 Q And was she mentally okay? I mean, was she able to 24 think and recognize people and know who -- 25 A Oh, yeah, she knew all that.

4 (Pages 13 to 16)

Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al,

Page 17 1 Q Nothing wrong with her? 2 A Nothing been wrong with her. 3 Q Was she right-handed? 4 A Yes, she was. 5 Q Was she able to write? 6 A No, she wasn't able to write. 7 Q She had a shaky hand? You're shaking your right hand. 8 A Yeah, like that. [Demonstrates.] 9 Q But she was able to know what she wanted and what she 10 wanted to do? 11 A Uh-huh (affirmative), but she couldn't write. 12 Q She just couldn't sign her name? 13 A Unh-unh (negative). 14 Q Okay. 15 MR. COPE: That's all. 16 MR. RISSLER: One more follow-up. 17 REDIRECT EXAMINATION 18 BY MR. RISSLER: 19 Q Did you discuss -- after you signed into the nursing 20 home did you discuss with her any of the documents that 21 you had signed for her? 22 A Just saying that I was signing her in, that was it. 23 Q Okay. And she understood that you had signed her into 24 the nursing home? 25 A Yes.	Page 19 1 STATE OF SOUTH CAROLINA) 2) CERTIFICATE 3 COUNTY OF HAMPTON) 4 Be it known that I took the foregoing deposition 5 of Ellen Jenkins. 6 That I was then and there a Notary Public in and 7 for the State of South Carolina-A1-Large. 8 That by virtue thereof I was duly authorized to 9 administer an oath, 10 That the witness was by me first duly sworn or 11 affirmed to testify the truth, the whole truth, and 12 nothing but the truth, concerning the matter in 13 controversy aforesaid; 14 The foregoing transcript represents a true, 15 accurate and complete transcript of the testimony given 16 by said deponent after first being duly sworn, at the 17 time and place aforesaid, to the best of my skill and 18 ability, said deposition was reported by method of 19 Stenomask utilizing speech recognition with digital 20 backup. This transcript may contain quoted material, 21 said material is transcribed as read or quoted by the 22 speaker 23 I further certify that I am neither employed by 24 nor related to any of the parties in this matter nor 25 their counsel; nor do I have any interest, financial or otherwise, in the outcome of this action IN WITNESS WHEREOF I have hereunto set my hand and seal this 25th day of June, 2011 Christina L. Richardson Professional Court Reporter Notary in and for the State of South Carolina My Commission Expires: May 26, 2015
Page 18 1 Q Okay. 2 MR. COPE: All right, That's it. 3 4 5 WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE 6 DEPOSITION IS CONCLUDED AT 2:01 P.M. 7 8 THE DEPONENT WAIVED THE READING 9 AND SIGNING OF THE DEPOSITION. 10 11 (*This transcript may contain quoted material. 12 Such material is reproduced as read or quoted by the 13 speaker.) 14 15 16 17 18 19 20 21 22 23 24 25	

5 (Pages 17 to 19)

Exhibit 21

STATE OF SOUTH CAROLINA

COUNTY OF FLORENCE

Ann Coleman, Individually, and as Personal
Representative of the Estate of Mary Brinson,
☒ Plaintiff

v.

Mariner Health Care, Inc. F/K/A Mariner Post-Acute
Network, LLC, Mariner Health Care Management
Company, Mariner Health Central, Inc., Mariner
Health Group, Inc., MHC Holding Company, MHC
Florida Holding Company, MHC Gulf Coast Holding
Company, MHC Midamerica Holding Company,
MHC Rocky Mountain Holding Company, MHC
Northeast Holding Company, MHC West Holding
Company, MHC Texas Holding Company, MHC
Midatlantic Holding Company, Living Centers-
Southeast, Inc., Grancare South Carolina, Inc.,
Individually And D/B/A Faith Health Care Center,
Savaseniorcare Management, LLC, Savaseniorcare
Administrative Services, LLC, Savaseniorcare, LLC,
Savaseniorcare, Inc., National Senior Care, Inc.,
Palmetto Health Care, LLC, Palmetto Faith
Operating, LLC, Individually And D/B/A Faith
Health Care Center, Ask Holdings, LLC, Leonard
Grutesin, An Individual, Murray Forman, An
Individual, Boyd P. Gentry, An Individual, Abraham
Shaulson A/K/A Abraham Shavison A/K/A A.
Shawson, A/K/A Abraham Shawson, An Individual,
Avi Klein, An Individual, SC Property Holdings,
LLC, SC Faith, LLC, And John Does 1-25.

☐ Defendant.

IN THE COURT OF COMMON PLEAS

CASE NO.

2010-CP-21-00835

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

FILED
2011 MAR 25 PM 3:59
CONNIE REEL-SHEARIN
Clerk of Court
FLORENCE COUNTY, SC

Plaintiff's Attorney:

Matthew Christian, Bar No. 70516

Address:

1007 East Washington Street, Greenville, SC 29601

phone: 864-232-7363 fax: 864-370-3731

e-mail: mchristian@christiananddavis.com other:

Defendant's Attorney:

, Bar No. :

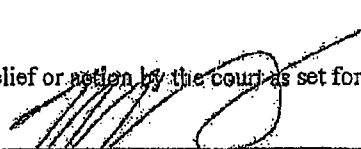
Address:

phone: fax:

e-mail: other:

- ☐ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☒ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

CERTIFIED: A TRUE COPY
Connie Reel-Shearin
CLERK OF COURT C.P. & G.S.
FLORENCE COUNTY, S.C.

SECTION I: Hearing Information	
Nature of Motion:	
Estimated Time Needed:	Court Reporter Needed: ☐ YES / ☐ NO
SECTION II: Motion/Order Type	
☐ Written motion attached ☒ Form Motion/Order	
I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for ☒ Plaintiff / ☐ Defendant	Date submitted <u>March 24, 2011</u>
SECTION III: Motion Fee	
☒ PAID -- AMOUNT: 25.00 ☐ EXEMPT:	
(check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court, or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: ☐ Other:	
JUDGE'S SECTION	
☐ Motion Fee to be paid upon filing of the attached order. ☐ Other:	JUDGE _____ CODE: _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____	Date Filed: _____
☐ MOTION FEE COLLECTED: _____ ☐ CONTESTED -- AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA

FILED

IN THE COURT OF COMMON PLEAS

COUNTY OF FLORENCE

MAR 25 PM 4:02

C.A. No.: 2010-CP-21-835

Ann Coleman, Individually, ~~CONING DEEL SHEARIN~~
Representative of the Estate of ~~BRINSON~~
Brinson,

Plaintiff,

v.

Mariner Health Care, Inc. f/k/a Mariner
Post-Acute Network, LLC, Mariner Health
Care Management Company, Mariner
Health Central, Inc., Mariner Health Group,
Inc., MHC Holding Company, MHC
Florida Holding Company, MHC Gulf
Coast Holding Company, MHC
MidAmerica Holding Company, MHC
Rocky Mountain Holding Company, MHC
Northeast Holding Company, MHC West
Holding Company, MHC Texas Holding
Company, MHC MidAtlantic Holding
Company, Living Centers-Southeast, Inc.,
GranCare South Carolina, Inc., Individually
and d/b/a Faith Health Care Center,
SavaSeniorCare Management, LLC,
SavaSeniorCare Administrative Services,
LLC, SavaSeniorCare, LLC,
SavaSeniorCare, Inc., National Senior Care,
Inc., Palmetto Health Care, LLC, Palmetto
Faith Operating, LLC, Individually and
d/b/a Faith Health Care Center, Ask
Holdings, LLC, Leonard Grunstein, an
Individual, Murray Forman, an Individual,
Boyd P. Gentry, an Individual, Abraham
Shaulson a/k/a Abraham Shavlson a/k/a A.
Shawson a/k/a Abraham Shawson, an
Individual, Avi Klein, an Individual, SC
Property Holdings, LLC, SC Faith, LLC,
and John Does 1-26.,

Defendant(s).

ORDER DENYING DEFENDANTS
MARINER HEALTH CARE
MANAGEMENT COMPANY,
MARINER HEALTH CENTRAL, INC.,
GRANCARE SOUTH
CAROLINA, INC., INDIVIDUALLY
AND d/b/a FAITH HEALTH CARE
CENTER, MARINER HEALTH CARE,
INC. f/k/a MARINER POST ACUTE
NETWORK, LLC, MARINER
HEALTH GROUP, INC., MHC
HOLDING COMPANY, MHC
FLORIDA HOLDING COMPANY,
MHC GULF COAST HOLDING
COMPANY, MHC MIDAMERICA
HOLDING COMPANY, MHC ROCKY
MOUNTAIN HOLDING COMPANY,
MHC NORTHEAST HOLDING
COMPANY, MHC WEST HOLDING
COMPANY, MHC TEXAS HOLDING
COMPANY, MHC MIDATLANTIC
HOLDING COMPANY, LIVING
CENTERS-SOUTHEAST, INC.,
SAVASENIORCARE
ADMINISTRATIVE SERVICES, LLC,
SAVASENIORCARE, LLC,
SAVASENIORCARE INC.,
NATIONAL SENIOR CARE, INC.,
LEONARD GRUNSTEIN, BOYD P.
GENTRY, AND MURRAY FORMAN
MOTION TO STAY ACTION AND
COMPEL ARBITRATION
(WRONGFUL DEATH ACTION)

CERTIFIED: A TRUE COPY

Cynthia H. Spain
CLERK OF COURT C.P. & O.S.
FLORENCE COUNTY, S.C.

PROCEDURAL

This matter came before the Court on the motion of Defendants Mariner Health Care Management Company, Mariner Health Central, Inc., Grancare South Carolina, Inc., individually and d/b/a Faith Health Care Center, Mariner Health Care, Inc. f/k/a Mariner Post Acute Network, LLC, Mariner Health Group, Inc., MHC Holding Company, MHC Florida Holding Company, MHC Gulf Coast Holding Company, MHC MidAmerica Holding Company, MHC Rocky Mountain Holding Company, MHC Northeast Holding Company, MHC West Holding Company, MHC Texas Holding Company, MHC MidAtlantic Holding Company, Living Centers-Southeast, Inc., SavaSeniorCare Administrative Services, LLC, SavaSeniorCare, LLC, SavaSeniorCare, Inc., National Senior Care, Inc., Leonard Grunstein, Boyd P. Gentry and Murray Forman, to stay the action and compel arbitration and was heard on January 6, 2011. All parties were represented by counsel and provided oral arguments and also submitted written memoranda and exhibits supporting their positions. The Court hereby denies Defendants' Motion to Stay Action and Compel Arbitration for the reasons set forth below.

BACKGROUND

Mary Brinson, deceased, was admitted to Faith Health Care Center on June 2, 2006 where she remained until September 16, 2006. She was then readmitted to Faith Health Care Center on December 13, 2006 and resided there until December 26, 2006. When Mary Brinson was admitted on June 2, 2006, the licensee was Grancare South Carolina, Inc., and when she was admitted on December 13, 2006, the licensee was Palmetto Faith Operating, LLC.

Ann Coleman is the Personal Representative of the estate of Mary Brinson. Ann Coleman is the sister of Mary Brinson, deceased. When Mary Brinson was admitted to Faith Health Care Center on June 2, 2006 and on December 13, 2006, no one had a Power of Attorney for Mary Brinson. Furthermore, at that time no one had a conservatorship and no one had been

appointed guardian for Mary Brinson during these times. Despite the fact that Ann Coleman did not have a Power of Attorney for her sister, Faith Health Care Center requested that Ann Coleman sign an Arbitration Agreement during the admission process when Mary Brinson was admitted on both occasions. It is from the June 1, 2006, Arbitration Agreement which these Defendants seek to enforce.

DISCUSSION

1. The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister.

The Arbitration Agreement is not enforceable because Ann Coleman lacked the capacity to contract on behalf of her sister. South Carolina law recognizes that arbitration agreements are contracts. The interpretation and enforcement of arbitration agreements are scrutinized using contract principles of law. The Defendants' own Admissions Agreement also recognizes that the Arbitration Agreement is a contract. It is a basic tenant of contract law that the parties to the contract must have the capacity to contract.

"The first element of a contract is that the parties have the capacity to contract... Further, capacity to contract relates to the status of the person rather than to circumstances surrounding the contract." (17 C.J.S. Contracts §32) Ann Coleman did not have that authority. Furthermore, Defendants admit that they are not aware of any Power of Attorney held by Ann Coleman on behalf of Mary Brinson at the time that the Arbitration Agreement was signed (Defendants Answers to Interrogatories—Mariner Interrogatory 24 and Grancare Interrogatory 32).

Defendants rely upon the South Carolina Adult Health Care Consent Act (S.C. Code Ann. §44-66-10 *et seq*) and the South Carolina Bill of Rights for Residents of Long-Term Care Facilities (S.C. Code Ann. §44-81-10 *et seq*) as granting authority to Ann Coleman to enter into the Arbitration Agreement on behalf of her sister, Mary Brinson. S.C. Code Ann. §44-66-30

notes that "(A) Where a patient is unable to consent, decisions concerning his health care may be made by the following persons in order of priority: ... (6) an adult sibling...of the patient..."

S.C. Code Ann. §44-66-20(1) provides the definition of "health care" as meaning "a procedure to diagnose or treat a human disease, ailment, defect, abnormality, or complaint, whether of physical or mental origin. It also includes the provision of intermediate or skilled nursing care; services for the rehabilitation of the injured, disabled, or sick persons; and the placement in or removal from a facility that provides these forms of care." It says nothing that could be construed as conferring the ability to enter into a separate legal document waiving an individual's rights to due process under the law for another individual. Clearly, this act does not confer legal authority to enter into contracts for another person.

It is admitted by all parties that Mary Brinson did not have the capacity to contract for herself. The Defendants admit that Ms. Brinson was incompetent by virtue of their responses to Plaintiff's Request to Admit in addition to the fact that the medical director at the Faith Healthcare Center facility certified that Ms. Brinson was unable to consent to or make her own healthcare decisions.

While the South Carolina Adult Healthcare Consent Act does grant Ms. Coleman the authority to make "healthcare decisions" on behalf of her sister, consent for medical treatment for someone unable to consent is not the same as binding an incompetent person to a legally binding contract such as an arbitration agreement without the authority to do so.

Defendants also rely on S.C. Code Ann. §44-81-10 *et seq* to argue that Ms. Coleman has the legal authority to bind her sister to a contract and waive her sister's rights under the law. This Court declines to adopt this application of this Act. The Bill of Rights for long-term care facilities sets out the rights given to a long term care resident or resident's representative under the law; however, these rights are, once again, rights concerning the resident's access to

healthcare and to be free from abuse and does not purport to grant others authority to enter into contracts for the resident. The Bill does not contemplate the resident's or the resident's representative's rights under the law for the authority or capacity to contract. The Bill defines representative as "a resident's legal guardian, committee, or next of kin or other person acting as agent of a resident who does not have a legally appointed guardian." The fact that the authors of this Bill felt it necessary to note that the resident may not have a guardian appointed under the law affirms their intentions that the Bill was designed to protect an individual's right of access to healthcare whether or not the individual has appointed a representative under the law. The Bill does not allow for an individual without any authority from the resident to be imbued with the legal authority to enter a contract waiving a resident's rights under the law.

The courts in North Carolina have recently decided an issue similar to the one at hand, finding that the authority granted by a state's Health Care Consent Act does not grant legal authority for the purpose of entering binding contracts. *Munn v. Haymount Rehabilitation & Nursing Center, Inc., et. al.*, No. COA 10-105 (NC Ct.App., Filed 21 Dec. 2010). In fact, in *Munn*, the Court specifically notes that "consent for medical care for another person who is unable to consent is a completely different issue than being an agent who has the authority to enter into a contract such as an arbitration agreement." Therefore, with similar reasoning this Court finds that Ann Coleman did not have actual authority to enter into the Arbitration Agreement on behalf of Mary Brinson.

The Defendants further argued that Ann Coleman acted as Mary Brinson's apparent agent. South Carolina case law on this issue is well established. Defendants argue that an agent's implied authority can be circumstantially provided by evidence and conduct and in doing so, rely on *Hell-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966), and *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004). This reliance is

misplaced. *Heil-Quaker* and *WDI Meredith & Co.* hold that apparent agency is based upon the principal holding the agent out or allowing the agent to hold himself or herself out with the alleged authority. "Apparent authority is the authority that the principal intended the agent to have or such power that a principal holds his agent as possessing or permits him to exercise." *Heil-Quaker v. Swindler*, 255 F.Supp. 445 (D.S.C. 1966). Because Mary Brinson was incompetent, she was incapable of granting the power to Ann Coleman and incapable of making a decision to allow Ann Coleman to hold herself out as Mary Brinson's agent. Therefore, Mary Brinson as the principal did never and could never exercise such an intent. If a person does not possess the capacity to make their own healthcare decisions, they would not possess the capacity to convey their rights under the law to another individual. Furthermore, even if such an individual could convey such rights in such circumstances, there is no evidence that Mary Brinson exhibited such an intent.

The Defendants further rely on *WDI Meredith & Co., v. American Telesis, Inc.*, 359 S.C. 474, 597 S.E.2d 885 (Ct.App. 2004) for the proposition that "to establish apparent authority, either the principal must intend to cause the third person to believe the agent is authorized to act for him, or he should realize that his conduct is likely to create such belief". As the court also noted in *WDI Meredith*, "an agency may not, however, be established solely by the declarations and conduct of an alleged agent." (citing *Muller v. Myrtle Beach Golf & Yacht Club*, 303 S.C. 137, 142-143, 399 S.E.2d at 433 (Ct.App. 1990) overruled on other grounds by *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 532 S.E.2d 868 (2000)). An incompetent individual such as Mary Brinson would be unable to possess this intent or realize that any conduct would create such a belief.

The Defendants also rely on *Carraway v. Beverley Enterprises Alabama, Inc.* 978 So. 2d 27 (Aa. 2007). In this Alabama case, the Plaintiff was a brother of a resident of a nursing home

facility who executed a number of documents on his sister's behalf on her admission to the facility, including an arbitration agreement. The brother of the plaintiff did not have a Power of Attorney. Shortly after his sister's admission, a Power of Attorney was executed naming the brother as her attorney-in-fact. The fact that the sister provided a Power of Attorney shortly after her admission indicates that she was indeed competent, unlike the present case with Mary Brinson. Therefore, the sister could have allowed or exhibited the intent for her brother to be held out as her representative unlike Mary Brinson. Furthermore, in *Carraway* the sister in essence ratified the representation by the brother by shortly thereafter naming him as her power of attorney by her own decision. This court finds the reasoning of *Munn* to be on point and applicable. Therefore, since Mary Brinson, the principal, was incapable of making any decisions or demonstrating any intentions conveying any authority to Ann Coleman, Ann Coleman did not have the apparent authority to contract or to enter into a binding contractual agreement such as an arbitration agreement on behalf of Mary Brinson.

Furthermore, according to the Defendants' admission documents, they were aware that Ann Coleman did not have a Power of Attorney. The face sheet from the admissions documents as well as other documents indicate that Ann Coleman did not have any other legal oversight, durable power of attorney or healthcare proxy. The Defendants are sophisticated individuals and corporations which are accustomed to dealing with arbitration provisions and understand the implications of a Power of Attorney. (*Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19 at 24 {¶29}). The Defendants cannot reasonably assert that Ann Coleman was the apparent agent of Mary Brinson when they had the knowledge to understand the meaning of a Power of Attorney and the fact that Ann Coleman did not have one. The fact that the Defendants have a form which would allow for the documentation of some form of authority indicates that they knew that there are certain requirements which must be met before an

individual can be imbued with the authority to act as an agent, and further demonstrates that they knew that none of the documents which would give Ann Coleman such authority existed at the time that Mary Brinson was admitted to their facility.

Therefore, Ann Coleman had neither actual nor apparent authority to act on behalf of Mary Brinson and to sign away her right to a jury trial by entering into the arbitration agreement. As a result, the arbitration agreement is null and void because Ann Coleman lacked the capacity and authority to ever execute it on behalf of Mary Brinson.

2. The Arbitration Agreement is not enforceable against the statutory beneficiaries.

The agreement to arbitrate explicitly specifies that it is "an agreement to arbitrate any dispute that might arise between Mary Brinson ("Resident") and/or _____ ("Legal Representative") and Faith Healthcare ("Facility")...". The agreement clearly allowed for the application of the agreement to extend to a resident's representative and, in this instance, was not so applied. Even if so applied, in the current actions, Ann Coleman has filed both a wrongful death and a survival action. While this court finds independently that Ann Coleman lacked the authority to enter into the contract on behalf of Mary Brinson and is therefore, null and void, this court also finds that the arbitration agreement cannot be enforced because it cannot apply to statutory beneficiaries who are not parties to the agreement. This principal has been specifically upheld in other jurisdictions. (*Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (2010). *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 823 N.E.2d 19).

While Ann Coleman did not have authority to waive the rights of Mary Brinson, even if she did, she did not have the authority to waive the right to statutory beneficiaries under the arbitration agreement at hand. South Carolina law is clear that a wrongful death claim exists for the statutory beneficiaries. Because the statutory beneficiaries are not parties to the contract, and

because the statutory beneficiaries have not conveyed any power to the signatory to the agreement, their claims could not be waived and any attempt to apply the agreement to them would be null and void.

3. The Arbitration Agreement is procedurally and substantively unconscionable and impossible to enforce.

The Defendants acted in a manner inconsistent with their own policies and procedures. The facility policy in effect at the time of Mary Brinson's admission clearly required that a member of the admissions staff explain the admissions and financial documents to the person signing them. This includes the Arbitration Agreement at issue here. Specifically, the policy states its purpose as intended to "provide an informative environment that should reduce the fears and anxieties of the resident and family during the admissions process" and requires that "the Administrator, through the Admissions Staff, is responsible for ensuring that the facility and the resident follow the established admission policy, as it may apply." Additionally, the policy requires that "the Admission staff will explain and offer an Arbitration Agreement to the resident or responsible party (emphasis added)". On the basis of the Affidavit of Ann Coleman and the admission of the Defendants that the Arbitration Agreement was presented as part of a larger admissions package, the Court finds that these documents were not explained to Ms. Coleman, nor was it made clear to her that the Arbitration Agreement was voluntary and not a requirement for Mary Brinson's admission to the facility.

Additionally, it is the finding of this Court that, even were the Arbitration Agreement valid, it can not be construed to apply to all claims at issue in the case at hand. An Arbitration Agreement, or any contract, for that matter, applies only to claims arising which would be made by someone standing in the shoes of the contractor, in this case, Mary Brinson, and cannot be construed so as to apply to those claims which may be brought on behalf of others with standing

to a claim. Claims that have been made on behalf of Ann Coleman and the other statutory beneficiaries of Mary Brinson's estate are not and were not parties to the Arbitration Agreement and cannot retroactively be joined to the contract.

Moreover, not all of the Defendants to this case have moved for arbitration—specifically, there are five defendants to the case at hand who are not currently seeking to enforce arbitration. In fact, one of these defendants, Palmetto Health Care, LLC, had previously moved for enforcement and has subsequently withdrawn its petition. Parties who are not seeking arbitration cannot be forced to arbitrate a matter any more than individuals who are not party to the agreement can. As a result, this Court is faced with the possibility that, if the Arbitration Agreement is deemed valid portions of the claims along with some of the parties would be subject to arbitration while other portions of the claims and different parties to this action would be subject to trial by jury. Should this be allowed, the very real possibility of conflicting rulings on common issues of law and fact may result.

Instructive on this issue is the matter of *Birl v. Heritage Care, LLC*, 172 Cal.App.4th 1313, 91 CalRptr.3d 777. In *Birl* a case was brought by the family of a deceased patient against a hospital, physicians, and a nursing facility and the nursing facility sought to compel arbitration. Of relevance, the Court here noted that “(1) the hospital and physicians with no arbitration agreement were involved in the same transaction as the nursing facility; (2) all defendants were involved in a series of related transactions with the patient; (3) there was a possibility of conflicting rulings on common issues of law or fact; and (4) patient's family members were third parties to the patient's arbitration agreement.” In its ruling denying the nursing facility's motion to compel arbitration, California's Appellate Court noted that “the trial court properly noted the possibility of conflicting rulings on common issues of law or fact if defendant Heritage was not

joined to the court action with the other defendants...Different triers of fact in different proceedings could come to different conclusions..." *Id.* at 1321.

The Court in *Birl* also took note that the Plaintiffs in that action asserted claims "not just as successors in interest, but also individually and as surviving heirs" (*Id.* at 1321), just as Ms. Coleman has done in the cases at issue now, and that such claims for "wrongful death and emotional distress were brought by plaintiffs in their individual capacities" and not as persons who had stepped into the shoes of the decedent. It was the conclusion of the *Birl* Court that the possibility of conflicting rulings on a common issue of law or fact was real and that "different triers of fact could reach different conclusions as to which party was at fault, the cause of any injuries, and the apportionment of liability—unless all the parties are jointed to one action" (*Id.* at 1322). Based on such a finding, the Court determined that it was proper to deny the nursing facility's motion to compel arbitration.

While the circumstances of the current actions differ slightly from those of *Birl*, it remains consistent that compelling arbitration of certain claims but not of others and compelling arbitration with respect to some defendants but not others will result in the conflicting rulings as contemplated in *Birl*. Furthermore, such a division of the cases would result in an unreasonable hardship for Plaintiff, as she and the other statutory beneficiaries of Ms. Brinson's estate would be effectively forced to litigate claims arising from the same or related events in two separate forums. Therefore, to uphold the Arbitration Agreement would not only pose a potential impossibility, it is also unreasonable and unconscionable to force a Plaintiff to prosecute her claims in such a fashion, especially when this issue was not explained to her. Our Courts have discussed and recognized that it is proper to deny Arbitration Agreements with impossibility of enforcement. (*Grant v. Magnolia Manor-Greenwood, Inc.*, 383 SC 125, 678 S.E.2d 435 (S.C. 2009)).

It is the finding of this Court that the Arbitration Agreement was presented to Ms. Coleman as part of a larger admissions packet and the meaning of the Arbitration Agreement was not explained; that Ms. Coleman was not informed that her signature on the Arbitration Agreement was optional and not a prerequisite for her sister to receive care; that the current conditions are that most, but not all of the defendants are seeking to compel arbitration; and compelling arbitration of Plaintiff's claims while not compelling arbitration to some claims against other Defendants, or by statutory beneficiaries who are not seeking either arbitration or were not parties to the contract makes the Arbitration Agreement as a whole impossible, unconscionable and therefore, unenforceable.

4. The Defendants' delay has effectively nullified the agreement and waived any right the Defendants may have had to force Arbitration.

The Plaintiff's Notice of Intent was filed in July of 2009, providing the Defendants with notice of impending litigation. The Notice of Intent stage took a usual course and, in fact, was extended beyond the normal time frame due to the substantial number of defendants in the case. The parties completed the required pre-suit mediation in January of 2010 which was unsuccessful in reaching a resolution. The Plaintiff filed the Summons and Complaint in March of 2010. Defendants began filing their Answers in May of 2010, and it was at this time that Plaintiff was provided with the first notice of the existence of an Arbitration Agreement and the Defendants' allegation that the issues and incidents addressed by Plaintiff's Complaint were governed by said Arbitration Agreement only by virtue of one of the Defendants' affirmative defenses. Even in light of said notice, Defendants did not move to seek enforcement of the Arbitration Agreement until August of 2010, more than a year after they had been first placed on notice of pending litigation and had been served with the Notice of Intent to Sue. This was also well after Plaintiff had served Discovery and filed a Motion to Compel.

The Courts in South Carolina have long recognized the act of abandonment as a valid basis for an exception to a contract's enforceability:

Generally, no-damage-for-delay provisions are valid and enforceable so long as they meet ordinary rules governing the validity of contracts. See Annot., *Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract*, 74 A.L.R.3d 187 §2[a] (1976). A certain majority of jurisdictions, however, recognize certain exceptions to such clauses. *Id.* Among the recognized exceptions are (a) delay caused by fraud, misrepresentation, or other bad faith... (c) delay which has extended such an unreasonable length of time that the party delayed would have been justified in abandoning the contract... *U.S. f/w/b/a Williams Electric Company, Inc. v. Metric Constructors, Inc.* 325 S.C. 129, 480 S.E.2d 447 (1997).

The contract at issue here is, of course, the Arbitration Agreement. First, the Agreement does not contain a "no-damage-for-delay" provision, and, as such, had Defendants intended to rely upon the Agreement, they should have acted promptly upon the first notice of a civil action. Secondly, and being generous to Defendants, they waited a full nine months after Plaintiff's first filings to make any mention of an Arbitration Agreement and an additional three months more before moving to enforce said Agreement.

"[I]n South Carolina, there exists in every contract an implied obligation of good faith and fair dealing." *Id.* citing *Adams v. Creel*, 320 S.C. 274, 465 S.E.2d 84 (1995); *Parker v. Byrd*, 309 S.C. 189, 420 S.E.2d 850 (1992); *Tharpe v. G.E. Moore*, 254 S.C. 196, 174 S.E.2d 397 (1970). Continuing, "A number of courts recognize an exception to a no-damage clause where delays are so unreasonable in length or duration that they amount to an abandonment of the contract..." *U.S. f/w/b/a Williams Electric* at 134-135 citing 74 A.L.R.3d at 226-230 §7(i). "An abandonment need not be express but may be inferred from the conduct of the parties and attendant circumstances." *Quality Concrete Products, Inc., v. Thomason*, 253 S.C. 579, 172

S.E.2d 297 (1970). "Abandonment of a contract by one party is the giving up of the right of benefit due from the other party." *Ro-Lo Enterprises v. Hicks Enterprises*, 294 S.C. 111, 362 S.E.2d 888 (Ct. App. 1987). "As with the above mentioned exceptions, an abandonment of the contract involves a breach of the implied obligation of good faith and fair dealing. Accordingly, we adopt this exception and find that if a party abandons the contract, they also abandon their right to rely on a no damage for delay clause." *U.S. f/u/b/a Williams Electric* at 135. Likewise, South Carolina Courts have previously considered and found that significant delay is tantamount to abandonment and constitutes a sufficient basis to support a finding of abandonment with respect to an arbitration agreement. (See also *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003), *Deloitte & Touche, LLP v. Unisys Corp*, 358 S.C. 179, 594 S.E.2d 523).

As previously discussed, the Arbitration Agreement the Defendants now seek to enforce does not contain a no-damage-for-delay clause, which make the performance under the Agreement an even more time-sensitive issue. The Defendants delayed almost a year before notifying Plaintiff of such an agreement and waited more than a year before moving for the enforcement of the Agreement. During the entire length of their delay, they conducted themselves in a manner consistent with parties that intended to proceed with litigation through the confines of the judicial process. It is the ruling of this Court that, the Defendants, through their actions and delay, abandoned any rights they may have been afforded to force this matter to arbitration. To allow the Defendants to now insist on adherence to the Arbitration Agreement which was the subject of the Motion before this Court, not only amounts to an unconscionable act, but it is also in disagreement with established precedent—precedent that finds contracts far more lenient on the issue of delay than the one at hand to have been abandoned in the face of acts such as those displayed by the Defendants here.

5. **Excepting GranCare South Carolina, Inc., Mariner Health Care Management Company, and Mariner Health Central, Inc., the Defendants bringing this motion have argued in a manner inconsistent with the parties who have standing to enforce an Arbitration Agreement.**

GranCare South Carolina, Inc., was the operator of Faith Healthcare Center at the time of Mary Brinson's June 2006 admission, and all of the other defendants bringing this motion have alleged elsewhere that they do not operate nursing homes, do not have any ties to Faith Healthcare Center, have never transacted business in South Carolina, do not own property in South Carolina, and have never had any influence over the operations of Faith Healthcare Center. In fact, simultaneous to the hearing of this Motion to Compel Arbitration, these same Defendants argued a Motion to Dismiss for Lack of Personal Jurisdiction. Yet despite these protestations, these Defendants have sought to enforce an Arbitration Agreement between a facility they contend they have no interest in or control over, in a state they do not transact business in, in an industry in which they do not participate, and that this Court holds no jurisdiction over them. It cannot be rationally argued that all of these Defendants are parties to this contract, while at the same time argue that they have never contracted in South Carolina, never conducted business in South Carolina or are not tied in with the operation of the nursing facility. If the Defendants' arguments were accepted as true, then they would not have standing to enforce the Arbitration Agreement and the impossibility of prosecuting the claims in two separate forums becomes even more significant as discussed hereinabove.

6. **The Defendants' argument that Mary Brinson was a third party beneficiary to the contract is illogical and premised on the rights of Ann Coleman as signatory, which said rights do not exist.**

Defendants' have sought to argue that Mary Brinson was the third party beneficiary to the Admissions and Arbitration Agreements. While this Court concedes that it was Ms. Brinson's admission into Faith Healthcare Center that was contemplated by the Admissions Agreement, the

Defendants' extension of this argument that seeks to cast Ms. Brinson as a third party beneficiary of said agreements is misplaced as it assumes that Ann Coleman had the right to contract on behalf of Ms. Brinson. As this Court has already discussed at length, while Ann Coleman did have the right under the Adult Health Care Consent Act to consent to medical treatment, she did not have the right to commit her sister to a legally binding contract that agreed to the removal of Ms. Brinson's rights under the law. Because Ann Coleman did not have the right to contract on behalf of her sister, Mary Brinson cannot possibly be a third party beneficiary as the contract itself was never valid.

7. The Defendants' argument that Plaintiff should be equitably estopped from denying the existence of an enforceable Arbitration Agreement is rejected.

As with the argument concerning the third party beneficiary status of Mary Brinson, the Court finds that the Defendants' argument with respect to the Arbitration Agreement and estoppel of the Plaintiff is, once again, misguided and assumes a premise which this Court has previously rejected.

The principle of estoppel in equity stands on the very foundation of right and fair dealing. It considers and weighs the conduct of men in their dealings with each other and gives that effect and meanings to their actions which common sense and justice dictate. The essential elements of equitable estoppel are ignorance of the party invoking the estoppel of the truth as to the facts in question and a misrepresentation or deceptive conduct of the party against whom estoppel is sought to be applied, which in fact misleads the person asserting the estoppel to rely on the misrepresentation or conduct to change his position prejudicially as a result of the reliance. *SCJur* "Estoppel" §4.

The Defendants' estoppel argument is not only misguided, it misses the true nature of estoppel. As this Court has previously discussed, it was Faith Healthcare Center's failure to explain the Arbitration Agreement in accordance with the Defendants' policies and procedures coupled with the manner in which the Arbitration Agreement was presented to Ann Coleman that

caused and contributed to Ms. Coleman not understanding the true nature of the document she was signing. The unconscionability of this process as described hereinabove serves as an additional sustaining ground for the finding that the Arbitration Agreement is not valid. The Defendants could not reasonably rely on the contract/agreement when they knew that Ann Coleman lacked the authority to enter into such a contract/agreement. The Defendants are assuming that it is the representation of the agent and not the principal that is the determinant of apparent authority and an establishment of agency when, as this Court has already discussed, it is the actions of the principal. As such, this Court rejects the Defendants' argument for equitable estoppel.

Furthermore, the Defendants have argued that Plaintiff cannot deny the validity of the Arbitration Agreement yet rely on the Admissions Agreement in alleging that the Defendants' were in breach of contract with respect to their contractual obligation to provide appropriate medical care to Mary Brinson. It is the Defendants' contention that the Arbitration Agreement and the Admissions Agreement are part of the same agreement between the parties and, as such, Plaintiff cannot disclaim the Arbitration Agreement. Defendants further argued that the Arbitration Agreement was part of the entire agreement between the parties and that the Plaintiff should not be able to argue that the Arbitration Agreement is invalid while asserting claims arising out of the relationship between the parties and that the Plaintiff should be equitably estopped from doing so. Plaintiff opposed these contentions. The errors in this argument have already been discussed. The Defendants again assume that the Arbitration Agreement and Admissions Agreement are on the same footing. As this Court has stated before, they are not. An agreement concerning the provision of health care is a far different matter than an agreement to waive legal and constitutional rights. As such, the Defendants' argument concerning estoppel is rejected.

CONCLUSION

This Court declines to enforce the Arbitration Agreement. Ann Coleman lacked the authority to bind her sister to any contract which removed her rights under the law and the Constitution. That she has the statutory authority to assist in making decisions regarding the treatment and care on behalf of her sister is irrelevant to the determination of whether she had the authority to contract on behalf of her sister in a separate legal agreement. The determination of agency is made based upon the principal and not the agent, and the Defendants' own documents demonstrate that they were aware that Mary Brinson was incapable of demonstrating any such intention or making any such representation. The Defendants cannot now reasonably argue that they thought Ms. Coleman had "apparent" authority, as they were aware of the legal requirements governing arbitration agreements.

Likewise, the Arbitration Agreement does not apply to all parties to this suit as it governs neither the claims brought on behalf of Mary Brinson's statutory beneficiaries, nor a portion of the Defendants who have not sought to force arbitration. Such circumstances give rise to the possibility of conflicting findings based on the same facts depending on the forum in which the issues are heard. These circumstances render the Arbitration Agreement unconscionable and impossible. Adding to the Agreement's unconscionability is Faith Healthcare Center's failure to adequately and appropriately inform Ms. Coleman as to the nature of the documents she was signing. She was not advised of the meaning of the Arbitration Agreement, nor was she advised that her signature on said Agreement was voluntary and that a refusal to sign would have no affect on her sister's admission to the facility.

The Arbitration Agreement was further abandoned by the Defendants through their delay. The Defendants proceeded to engage in the litigation process with Plaintiff, allowing this case to

more forward for more than a year after the filing of the Notice of Intent before they sought any enforcement of the Arbitration Agreement. South Carolina precedent is clear that, had the Defendants intended to seek enforcement of the Agreement, they should have done so at the outset of this matter, not more than a year after its genesis. And while it has been the finding of this Court in a separate Order that the Plaintiff has made a sufficient showing for jurisdiction over Defendants in this case, the myriad of issues discussed previously preclude any finding in favor of their Motion to Compel Arbitration, as they have argued inconsistent and irreconcilable positions.

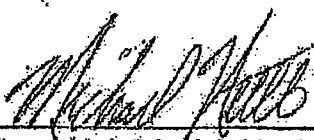
Finally, it is the belief of this Court that the Defendants' arguments concerning the third party beneficiary status of Mary Brinson and the argument concerning equitable estoppel are misguided and are rejected by the Court.

Therefore, it is the finding of this Court that the Plaintiff did not have the legal authority to execute the Arbitration Agreement on behalf of her sister; the Arbitration Agreement does not apply to all parties to this suit, giving rise to the possibility of divergent outcomes premised on the same facts; that the Arbitration Agreement itself is impossible and unconscionable; and that the Defendants abandoned the Agreement through their delay in seeking its enforcement. As such, Defendants' Motion to Stay Action and Compel Arbitration is denied in its entirety.

IT IS SO ORDERED.

Florence, South Carolina

Date: 3-18-11


The Honorable Michael G. Nettles
Twelfth Circuit of the State of South Carolina

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CONNORRELL-SHEARIN
P.L.L.C.
FLORENCE COUNTY, SC

FILED

Exhibit 22

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
2009 JUL 13 P 3:22 Case Number: 2009-CP-23-6381

Florence L. Briody, Personal Representative)
of the Estate of Harriett Lucy Hartsgrove,)

Plaintiff,

vs.

THI of South Carolina at Magnolia Place)
at Greenville, LLC, THI of South Carolina,)
LLC, THI of Baltimore, Inc., Fundamental)
Long Term Care Holdings, LLC,)
Fundamental Administrative Services, LLC)
and Fundamental Clinical Consulting, LLC)

Defendants.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUL 13 2009
ORDER

This matter comes before the Court on Defendant THI of South Carolina at Magnolia Place at Greenville, LLC's Motion to Stay and to Compel Arbitration as follows:

I. FINDINGS OF FACT

1. Harriett Hartsgrove was 92 years old when she became a resident of Magnolia Place of Greenville in June 15, 2005. Ms. Hartsgrove executed a durable power of attorney on June 10, 2005.

2. On June 15, 2005, Ms. Hartsgrove's daughter, Florence L. Briody, executed all of the admissions documents on behalf of her mother, including an "Admission Contract" which contained an arbitration provision to be "administered by the National Health Lawyers Association (the 'NHLA')." The NHLA is now the American Health Lawyers Association or AHLA. Also on June 15, 2005, Mrs. Briody also executed a separate Arbitration Agreement in which the parties agreed to arbitrate "as provided by the National Arbitration Forum Code of Procedure."

3. Ms. Hartsgrove was injured in September 10, 2007 while in the custody and care of Defendant. Ms. Hartsgrove was hospitalized on September 15, 2007 as a result of this injury. Plaintiff alleges negligence related to the cause and treatment of this injury, which is the basis of the claims asserted in this action.

4. In 2004, the AHLA ceased administering pre-injury arbitration agreements.¹ At the time Mrs. Briody executed the Arbitration Agreement in June 2005, AHLA's rules of arbitration provided:

The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 *only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators.* For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

5. Under the AHLA Rules, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. Standing alone, the parties' waiver of this set of rights in the Admissions Contract's arbitration provisions and the AHLA rules appear to reflect their specific intent to arbitrate *exclusively* before that body. The AHLA has its own fee schedule that applies to all aspects of the arbitration. The AHLA appears to be an integral part of the agreement to arbitration.

6. However, at the same time as Mrs. Briody executed the Admissions Contract,

¹ Defendant contends that a later amendment to the AHLA rule permits arbitration under a pre-injury arbitration agreement if a judge orders the AHLA to administer the arbitration agreement. This rule was not in place at the time the parties executed the agreement. Second, the AHLA is not a party to this action and it is difficult to understand how the court issue an order directed at AHLA. Third, because Defendant contends that in fact the National Arbitration Forum's rule govern the arbitration, it is difficult to reconcile this contention with the application of the AHLA's subsequent amendment.

Mrs. Briody signed a separate Arbitration Agreement requiring "arbitration as provided by the National Arbitration Forum Code of Procedure" ("NAF Code"). The NAF has its own fee schedule that applies to all aspects of the arbitration. It also has rules on communications, service, counting of days, publication and form of the award, release of documents and administration. These terms are different than in the AHLA rules.

7. Importantly, as it relates to administration, the 2005 NAF Code provides:

"This Code shall be deemed incorporated by reference in every Arbitration Agreement, which refers to the National Arbitration Forum, the International Arbitration Forum, the Arbitration Forum, arbitration-forum.com or this Code of Procedure, unless the Parties agree otherwise. **This Code shall be administered only by the National Arbitration Forum.**"

(Emphasis added). Standing alone, the parties' agreeing to arbitrate as provided by the NAF Code of Procedure would appear to reflect their specific intent to arbitrate *exclusively* before that body. Based upon these rules which by its terms are incorporated by reference into the Arbitration Agreement, the NAF appears to be an integral part of the agreement.

8. Mrs. Briody was not given a copy of either the AHLA rules nor the NAF Code or Procedure at the time she executed either agreement.

9. On July 17, 2009, the NAF entered into a Consent Judgment with the State of Minnesota, following a yearlong investigation by the Minnesota Attorney General's office. The terms of the Consent Judgment clearly and unequivocally state that the National Arbitration Forum is to stop "any business related to the arbitration of consumer disputes."

10. This divestiture applies to all "Consumer Arbitration," which includes "any arbitration involving the dispute between a business entity and a private individual which relates to goods, services, or property of any kind *allegedly provided by any business entity to the*

individual, or payment for such goods, services, or property.² Paragraph 3 of the Consent Judgment states:

On or after July 24, 2009 no NAF Entity shall:

- a. Accept any fee for processing any new Consumer Arbitration.
- b. Administer or process any new Consumer Arbitration.
- c. In any manner participate in any new Consumer Arbitration.
- d. Attempt to influence the outcome of any arbitration proceeding currently pending before it.³

11. The parties mediated this case pursuant to S.C. Code §15-79-125 on April 22, 2009. Defendant did not move to compel arbitration nor demand arbitration before this mediation.

12. After filing the Notice of Intent but prior to filing litigation, counsel for Defendant, Mac White, represented to Plaintiff's counsel, W. Andrew Arnold, that there was an arbitration agreement between the parties.⁴

13. Plaintiff's counsel asked for a copy of the arbitration agreement between the parties, and Defendant's counsel provided him with a copy of an arbitration agreement, which stated that arbitration should be provided by the National Arbitration Forum Code of Procedure.

² Id. ¶ 2. The language of the Consent Judgment clearly indicates that this divesture applies to claims arising in ALL states, not just potential claims in the State of Minnesota.

³ Id. ¶ 3. Defendant does not dispute that this language encompasses actions involving allegations of negligent care at a nursing home in South Carolina.

⁴ The findings of fact contained in paragraphs 13 through 30 are based upon the record of filings and the facts contained in uncontradicted Affidavit of Counsel filed on behalf of Plaintiff. Defendant's counsel did not file an opposing affidavit nor present any testimony contradicting the facts set out in the Affidavit of Counsel.

Mr. White represented to Mr. Arnold that this agreement was *the* arbitration agreement between the parties.⁵

14. Plaintiff filed the Summons and Complaint in July 2009. It was served on Defendant in August 2009. Defendant did not move to compel arbitration nor did Defendant raise arbitration as a defense before serving an Answer in September 2009.⁶

15. Defendant served an Amended Answer in October 2009, which also failed to raise arbitration as a defense.

16. Plaintiff served discovery on Defendant in October 2009. Defendant asked for an extension and then served non-responses in December 2009, contending that they were not in possession of any documents responsive to such requests, which would have included arbitration agreements. (See Plaintiff's Motion to Compel.)

17. In December 2009, Plaintiff moved to compel discovery and moved to amend its complaint. Defendant opposed both motions. At no such time during these proceedings did Defendant raise either arbitration agreement as a defense to Plaintiff's claims or Plaintiff's motions. Plaintiff's motion to amend was granted and the court held that the amendments as it relates to THI of South Carolina at Magnolia Place at Greenville, LLC related back to August 2009.

18. In January 2010, Plaintiff had served subpoenas on several of Defendant's employees. In January 2010, Defendant made a motion to quash these subpoenas. At no time during these proceedings did Defendant raise either arbitration agreement as a defense.

⁵ This was shortly after the decision of *Grant v. Magnolia Manor of Greenwood*, 383 S.C. 125, 678 S.E.2d 435 (2009) had been decided which invalidated an agreement by the Supreme Court of South Carolina. This was also before the Minnesota consent order prohibiting the National Arbitration Forum (NAF) from administering arbitration in cases like the present case.

⁶ Plaintiff misidentified Defendant as "Magnolia Place of Greenville, Inc. d/b/a as Magnolia Place of Greenville."

19. In January 2010, Plaintiff filed and served its Amended Complaint. Plaintiff reserved discovery on Defendant in February 2010.

20. In February 2010, Defendant filed an Answer and for the first time, Defendant included a defense based upon the arbitration agreement. However, Defendant did not move to compel arbitration at that time.

21. Later in February 2010, Defendant served "responses" to Plaintiff's Interrogatories and Requests to for Production. In these responses, Defendant did not answer any interrogatories nor produce any documents, but instead objected to all discovery requests because of the existence of "an enforceable Arbitration Agreement." However, Defendant did not file a motion to compel arbitration at that time.

22. After receiving the discovery responses, Plaintiff's counsel alerted Defendant's counsel to the existence of the Minnesota consent order prohibiting NAF from administering arbitration in the present case. Defendant's counsel asked that Plaintiff's provide a copy of the consent order and indicated (perhaps implicitly) that he was unfamiliar with this consent order.

23. Plaintiff moved to compel responses to her Interrogatories and Requests to Produce. A hearing was scheduled for May 24, 2010.

24. As required by the standing court order, the parties mediated a second time on May 13, 2010.

25. On May 14, 2010 (ten days before the scheduled hearing on Plaintiff's motion to compel discovery), Defendant filed a motion to compel arbitration and requested that it be scheduled for May 24, 2010.

26. The delay in seeking to arbitrate this matter has resulted in Plaintiff's counsel spending 50 to 75 hours in attorney time, which would have been rendered unnecessary by a timely motion to compel arbitration.

27. The delay in seeking to compel arbitration of this matter has also resulted in the incurring of unnecessary expenses, including mediation expenses and other court costs.

28. Moreover, Defendant's Senior Counsel, Eva Gonzalez, represented to Plaintiff's counsel that liability insurance is provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. (Defendant has refused to provide a copy of this insurance policy to Plaintiff.)

29. In addition, there is a factual dispute as to whether the medical director was advised of Harriett's Hartsgrove injury. There may be claims against the medical director, but because of the delay, discovery may be delayed until after the statute of limitations expires, which may be in September 2010.⁷

30. Defendant's 17 month delay in seeking to arbitrate this matter and filing a motion to compel arbitration since the filing of the Notice of Intent and the almost 10 month delay since the filing of this action has resulted in prejudice to Plaintiff. Accordingly, Defendant has waived its right to enforce arbitration in this case.

II. CONCLUSIONS OF LAW

A. Standard of Review

When ruling on a motion to compel arbitration, the court uses a standard analogous to the summary judgment standard. See e.g., *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., Ltd.*, 636 F.2d 51, 54 (3d Cir.1980). "Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement." *Id.* "Although we [South Carolina Courts] are constrained to resolve all

⁷ This court does not intend to make a finding on the statute of limitations since there may be arguments regarding tolling, equitable and otherwise. This court merely takes note that the Ms. Hartsgrove's injuries occurred in September 2007 and generally, a three year statute of limitations applies to claims for negligence.

doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007).

Section 2 of the FAA states that:

A written provision in...a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC § 2 (emphasis added). "[T]he court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles v. United Healthcare Corp.* 338 S.C. 29, 37, 524 S.E. 2d 839, 844 (Ct. App. 1999) (citing *Johnson v. Circuit City Stores*, 148 F.3d 373, 377 (4th Cir. 1998) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995)). "Arbitration is a matter of contract and controlled by contract law." *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 563, 437 S.E.2d 22, 25 (1993) (citing 5 Am. Jur. 2d *Arbitration and Award* § 11 (1962)). This court has applied South Carolina contract law to the facts in the record of this case.

B. The South Carolina Supreme Court's Holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) Mandates Denial of Defendant's Motion to Compel Arbitration.

Defendant seeks to enforce two separate arbitration agreements, each of which reference different arbitration forums administered in accordance with different rules for arbitration, different methods of selecting arbitrators from lists of panels maintained by two different arbitration services. Despite these facts, Defendant argues that the parties designated the AHLA as "their chosen forum." Although this Court finds this argument to be without merit because of the existence of two different agreements to arbitrate with conflicting sets of procedures,

(discussed below in Part C), the South Carolina Supreme Court holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 383 S.C. 125, 678 S.E.2d 435 (2009) warrants denial of Defendants motion to compel arbitration even if the AHLA was the chosen forum of the parties. The Supreme Court in *Grant* held that because the selection of AHLA as an arbitration forum was an "integral" part of that arbitration agreement and because AHLA was no longer available to arbitrate the dispute, the arbitration agreement was unenforceable. *Id.* at 132. Because the same arbitration agreement is at issue in this case, this Court concludes that the decision in *Grant* is controlling and that a denial of Defendant's motion for arbitration to be administered by the AHLA.

Defendant seeks to re-litigate the issue decided in *Grant*, despite the fact that the law, the arbitration agreement, and the arbitration rules are the same as in *Grant*. Defendant argues that the Supreme Court overlooked a fact in the record of *Grant*, which Defendant explains in footnote 3 of its memorandum in support of its motion to compel arbitration:

decision was predicted on the erroneous presumption that the AHLA had amended its rules in 2004 to provide that in health care liability cases, 'the AHLA would only arbitrate claims pursuant to arbitration agreements entered into after the alleged injury occurred.' In fact, under its amended rules, the AHLA continues to arbitrate health care liability claims pursuant to pre-injury arbitration agreements *when ordered by a court to do so*.

Accordingly, Defendant indicates that "*Grant* is inapposite because the AHLA is available to administer the parties arbitration." In support of this position, Defendant cites a copy of AHLA Rules that were amended in 2006 in support of this contention and seeks to have this court *order AHLA to administer an arbitration between the parties*.⁸

⁸ Even if this court were to ignore all the other infirmities with Defendant's argument, the rule that Defendant's purport to rely upon makes clear that it only applies if "a judge orders that the service administer an arbitration...." This court does not believe that it can order the AHLA to do anything unless it is a party to this action. See e.g., *Green Tree Servicing, LLC v. Adams*, 375 S.C. 583, 654 S.E.2d 100 (S.C. App. 2007). The court may not act against a party without personal jurisdiction. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006). Moreover, a court should not render a judgment affecting the rights of a party without proper notice. *Ex*

First, the amended rule relied upon by Defendant was not in effect when the parties to the current dispute executed the Admissions Contract in 2005, and thus, at that time AHLA the provision relied upon by Defendant was not in existence at that time. At that time, the AHLA's rules of arbitration provided:

The parties shall be bound by these Rules whenever they have agreed in writing to arbitration by the Service or under the Rules. The Service will administer a "consumer health care liability claim" under the Rules on or after January 1, 2004 only if all of the parties have agreed in writing to arbitrate the claim after the injury has occurred and a copy of the agreement is received by the Service at the time the parties make a request for a list of arbitrators. For purposes of the Rules, a "consumer health care liability claim" means a claim in which a current or former patient or a current or former patient's representative (including his or her estate or family) alleges that an injury was caused by the provision of (or the failure to provide) health care services or medical products by a health care provider or the manufacturer, distributor, supplier, or seller of a medical product.

See Magnolia Healthcare, Inc. v. Barnes ex rel. Grigsby, 994 So.2d 159 (Miss. 2008).⁹ This court believes that the scope of claims governed by the AHLA rules at the time of entering into the contract reflects the agreement of the parties.¹⁰

The Defendant cites *Adler v. Dell, Inc.* No. 08-CV-13170, 2009 WL 4580739 (E.D. Mich. Dec. 3, 2009) as authority supporting its position. First, *Adler* conducted the same analysis as our Supreme Court *Grant* and reached a different conclusion. This court is not at liberty to adopt the *Adler* approach instead of *Grant*, which represents binding precedent. Nonetheless, the arbitration agreement in *Adler* stated that the "SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect..."

Parte South Carolina Dep't of Revenue, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct.App.2002). Thus, the AHLA remains unavailable whether it applies the 2005 AHLA rule that existed at the time the parties executed the agreement or the 2006 rules that were amended after the parties had entered into an agreement.

⁹ The Court relies on this *Magnolia HealthCare* case since a copy of the 2005 rules were not available to Plaintiff. Presumably, Defendant would have a copy of these rules dating back to 2005, and it has not contested this court taking judicial notice of the AHLA rules as found by the Mississippi Supreme Court.

¹⁰ This conclusion relates to the "meeting of the minds" requirement discussed further in Part C of this opinion.

Id. at *1 (capital letters in original and bold emphasis added). Thus, for various reasons, this court does not find *Adler* persuasive.

Second, even if the 2006 AHILA amendments can be said to expand the scope of the arbitration rules, these rules pre-date the decision in *Grant* by three years and were the rules upon which the Supreme Court relied in reaching his holding in *Grant*. This court is simply not persuaded that the Supreme Court reached a erroneous decision in *Grant* because it failed to take note of a central fact. Even so, there are compelling reasons for this court to reach the same conclusion as *Grant* that AHILA is no longer "unavailable."

First, the 2006 AHILA rules urged by Defendant make clear that the AHILA will only arbitrate a dispute (such as exist in this case) if it is ordered to do so by a court of law. This is because the AHILA will not honor a pre-injury arbitration agreement, and thus, the AHILA requires the court to make a new post-injury agreement for the parties. According to the AHILA,

If a judge gives a written order that the AHILA ADR Service administer an arbitration under the terms of a pre-injury arbitration agreement, signed by the parties, the AHILA ADR Service interprets the order as a *de facto* post-injury agreement to arbitrate the claim and thus will administer the matter.

<http://www.healthlawyers.org/Resources/ADR/Pages/RulesAmendment.aspx>¹¹ Considering the AHILA rules that existed at the times the parties contracted in 2005, such an order would indeed create a new agreement between the parties. The Court is "without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445 (1984)). This court is not willing

¹¹ This statement comes from the AHILA website cited by Defendant. Plaintiff provided the court with a copy of this website, without objection, during the hearing.

to make a new post-injury agreement by way of an order of this court to remedy a situation the parties did not undertake voluntarily to remedy themselves.¹² See *Grant*, 678 S.E.2d at 437 (“The parties did not modify the admission contract to reflect the AHLA policy change.”)

In addition, Defendant also seeks enforcement of a second arbitration agreement, which requires “arbitration as provided for by the *National Arbitration Forum Code of Procedure*.”¹³ Putting aside at the moment the contradictory AHLA arbitration agreement, the NAF agreement considered independently suffers from the same deformity as the arbitration agreement that contains the AHLA provision. The NAF is prohibited by court order from participating “any business related to the arbitration of consumer disputes” or “in any manner participat[ing] in any new Consumer Arbitration.”¹⁴ However, an arbitration conducted “as provided by the [NAF] Code of Procedure” must comply with Rule 1 of the NAF Code which states that “[t]his Code shall be administered only by the National Arbitration Forum.” (emphasis added).

Considering the NAF Agreement on its own terms, this court finds that the NAF is an “integral part” of the second arbitration agreement. See e.g. *Carideo v. Dell, Inc.*, 2009 WL 3485933 (W.D. Wash.) (holding NAF was integral to an agreement to arbitrate and expressly rejected approach of *Adler*); *Carr v. Gateway, Inc.*, 395 Ill.App.3d 1079, 918 N.E.2d 598 (Ill.App. 5 Dist. 2009) (holding NAF as forum was integral to the agreement.) In *Carr*, the Court quoted and cited *Grant* when it said: “[T]he designation of a [specific arbitral] forum such as the [NAF] ‘has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of

¹² It is difficult to understand how Defendant gets the benefit of a 2006 amendment when Defendant advocates an construction that reconciles the two arbitration agreements by suggesting that the intent was for the AHLA to conduct the arbitration in accordance with the NAF Code of Procedure. Despite this argument, Defendant repeatedly makes reference to the AHLA rules, which if the NAF Code governs are moot.

¹³ Plaintiff has attached a copy of the rules in existence at the time the parties signed the arbitration agreements.

¹⁴ See Consent Judgment, ¶ 1.

the arbitral award, and the cost of the arbitration.” *Id.* at 1087 (citation omitted). The adoption of a set of rules that by its own terms requires administration by a particular forum makes that forum “integral.”

And, since the NAF is unavailable, the ruling in *Grant* is controlling as to the arbitration agreement in the Arbitration Agreement as well. Accordingly, this court denies Defendant’s motion to stay this matter and compel arbitration.

C. There was no “Meeting of the Minds” on the Material Terms of an Enforceable Agreement to Arbitrate.

Assuming *arguendo*, that *Grant* is inapposite, Defendant’s motion encounters perhaps an even greater obstacle in that it seeks at once to enforce two separate and contradictory sets of arbitration procedures both of which are to be administered by separate and distinct forums. “The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate.” *Dowling v. Home Buyers Warranty Corp.*, II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993) (citing *Volt Info. Scis., Inc. v. Board of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). The contradictory nature of the two agreements makes it impossible to enforce fully enforce both without taking out the court’s blue pencil, rewriting each set rules to reconcile the differences and to make guess as to the secret intentions of the parties.

General contract principles of state law apply in a court’s evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 539, 542 S.E.2d 360, 364 (2001). The choice of the arbitral forum is one of the most important and material terms in an agreement to arbitrate. South Carolina common law requires that “[i]n order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with

regard to all essential and material terms of the agreement. *Grant* at 130 citing *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891(1989). This court finds that that the contradictory rules and the provisions of such rules that mandate administration by separate arbitral forums indicates clearly that the parties did not have a meeting of the minds in regards tot he material terms of an enforceable arbitration agreement.

First, the Supreme Court in *Grant* found that "[w]here designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution," the designation of a forum such as AHLA is "an integral part of the agreement." *Id.* at 131. This provisions cannot be reconciled with the separate agreement to arbitrate "as provided by the National Arbitration Forum Code of Procedure," which according to Rule 1, "shall be administered only by the National Arbitration Forum." *See e.g., Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002)(use of words such as "shall" or "must" indicates a mandatory requirement). This court concludes that an agreement that requires that AHLA administer an arbitration under Rules that mandate that the NAF administer the arbitration cannot be reconciled.

Moreover, there are procedures that the AHLA considers non-negotiable if it is to administer an arbitration. "Under the AHLA policy, **the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service.**" *Grant* at 131-32 (emphasis added). However, the NAF Code has different requirements regarding communications, service, counting days, publication and form of the award, release of documents and administration. Under the NAF, it provides its own panel of arbitrators. Applying the NAF Code would "vary" these non-negotiable and mandatory rules, on which AHLA participation is conditioned. Again, these provisions cannot be reconciled and this

court cannot rewrite a set of rules in an attempt to make one agreement from two sets of contradictory rules.

It is nonsensical that the parties could have had a meeting of the minds to use two separate procedures, to be administered by separate forums, each of which is "integral" to arbitration process provided by the respective rules, and each containing mandatory but contradictory procedures, not the least of which is separate and distinct methods of selecting arbitrators. Parties cannot be said to have had a meeting of the minds on matters which are indefinite, vague, uncertain, and even incomprehensible. "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement have often been held to prevent the creation of an enforceable contract."¹⁵ *Reed v. Boykin*, 282 S.C. 614, 320 S.E.2d 68 (S.C.App.,1984) quoting 1 CORBIN ON CONTRACTS, § 95 (1963). The existence of two contradictory arbitration provisions creates an indefinite and uncertain set of circumstances that is impossible for the parties and courts to decipher with any degree of confidence, especially five years after the fact.

In *Rockel v. Cherry Hill Dodge*, 368 N.J. Super. 577, 847 A.2d 621, 624 (N.J. 2004), the New Jersey Superior Court confronted a sufficient similar set of facts, which involved two distinct and different arbitration agreements. The New Jersey Superior Court held that "the arbitration agreement is highly ambiguous because the parties executed two documents which contain separate and somewhat disparate arbitration clauses. This ambiguity, we conclude, is fatal to the compelling of the arbitration of plaintiffs' CFA claims."

There was no meeting of the minds in regards to which forum would administer the arbitration, which rules would apply nor the scope of the claims subject to arbitration. There are

¹⁵ Plaintiff omitted a phrase inserted into the quoted material "[such as consideration, as we have in the instant case]" to avoid confusion.

no facts in the record which provide any clue to the manner in which both parties reconciled these contradictions in their minds, assuming such would have been possible since Plaintiff was never given a copy of either set of rules at the time of signing. *See Hooters of America, Inc. v. Phillips*, 39 F.Supp.2d 582 (D.S.C.1998) *affirmed and remanded*, 173 F.3d 933 (4th Cir. 1999)(meeting of the minds includes a meeting of the minds on the rules governing arbitration.) The Court is "not at liberty to consider the undisclosed or secret intentions of the parties but must be governed by their outward expressions." *Kable v. Simmons*, 217 S.C.161, 60 S.E.2d 79, 81 (1950). Accordingly, Defendant's motion must be denied because there was no meeting of the minds.

D. The Defendant Waived Its Right to Enforce the Arbitration Agreement.

Finally, even if this court was to determine that an enforceable arbitration obligation exists, then it is clear to this Court that Defendant has waived its right to enforce the arbitration agreements. Served with the Notice of Intent in December 2008, Defendant failed to assert the arbitration agreement or request arbitration for over 17 months. Having waiting 17 months after it was first served with the Notice of Intent and almost 10 months since being served with the Summons and Complaint, Defendant has deliberately delayed seeking to compel arbitration to delay the action.¹⁶ Defendant filed an Answer September 2009 and then an Amended Answer in October 2009, but in neither was arbitration asserted as a defense. Defendant served discovery in November 2009, filed a motion to quash in January 2010, sought a protective order in January 2010, participated in pre-suit mediation (April 2009) and then a year later, participated in court mandated mediation (May 2010). After objecting to discovery in March 2010, it held its motion to compel arbitration until the last possible day before it could use arbitration to further delay discovery. Defendant has certainly been unjustifiably slow in demanding arbitration.

¹⁶ Defendant has not proffered any reason to justify its 17 month delay in seeking to compel arbitration.

It is undisputed that "the right to enforce an arbitration clause may be waived." *Deloitte & Touche, LLP v. Unisys Corp.*, 358 S.C. 179, 184, 594 S.E.2d 523, 525 (S.C. Ct. App. 2004); *General Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct.App.2001); *Hyload, Inc. v. Pre-Engineered Prods., Inc.*, 308 S.C. 277, 280, 417 S.E.2d 622, 624 (Ct.App.1992); 6 C.J.S. Arbitration § 37 (1975). "A party may waive the right to arbitration by being unjustifiably slow in seeking arbitration." *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 550, 575 S.E.2d 74, 76- 77 (S.C. Ct. App. 2003)(emphasis added). The "party seeking to establish waiver must show prejudice through an undue burden caused by delay in demanding arbitration." *Id.* (citing *Sentry Eng'g & Constr., Inc. v. Mariner's Cay Dev. Corp.*, 287 S.C. 346, 351, 338 S.E.2d 631, 634 (1985)).

In this case, Plaintiff has litigated for 17 months, and Plaintiff's counsel has wasted at least 50 hours of valuable time, including the attendance of two fruitless mediations, neither of which would have not been necessary if Defendant had timely sought to compel arbitration. In addition, Plaintiff's has been required to amend pleadings and move to compel discovery, which required an expenditure of attorney time, which all would have been rendered unnecessary by a timely motion to arbitrate. Moreover, these activities resulted in unnecessary expenses, including motion fees, service fees, and mediation expenses. *See Evans v. Accent Manufactured Homes, Inc.* 352 S.C. 544, 575 S.E.2d 74 (S.C. App. 2003)(holding incurring costs that would not have been incurred had party moved for arbitration constituted prejudice).

Moreover, under the NAF Code of Procedure, Plaintiff can be held liable for "all expenses and costs, including attorney fees..." for commencing litigation. Defendant's litigation and costs are much more significant after 17 months than such would have been if Defendant would have sought to arbitrate at the outset of the action. This exposure to thousands of extra

dollars in sanctions for filing an action is not only unconscionable but a clear example of prejudice.

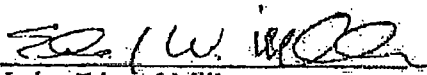
In addition, according to the uncontradicted facts contained in the Affidavit of Counsel, Defendant's Senior Counsel, Eva Gonzalez, has represented to Plaintiff's counsel that liability coverage was provided under a rapidly eroding insurance policy and that attorney fees and other expenses reduce the amount of insurance available to cover a judgment. Because the entity that manages the facility d/b/a Magnolia Place of Greenville has little or no assets, this potentially could completely eliminate a remedy for Plaintiff's harm. In addition, after 17 months, Defendants have successfully frustrated discovery, and now the statute of limitations may expire in September 2010. Potential claims against others will be placed in jeopardy if a stay is granted and the parties are required to select an arbitrator prior to being able to commence discovery.

"There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Id.*; see *Unisys*, 358 S.E. at 184, 594 S.E.2d at 525. The determination of whether one's actions constitute waiver is a question of fact. *Laser Supply and Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 676 S.E.2d 139 (Ct.App.2009). Based upon the facts before this court, this Court concludes that Defendant has waived its right to enforce any agreement to arbitrate that may exist between the parties.

IV. CONCLUSION

For all the reasons stated above, this Court denies Defendant's motion to compel arbitration and to stay the proceedings.

IT IS SO ORDERED.


Judge Edward Miller
Thirteenth Circuit Court Judge

Dated: 7/13/10

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

IN THE COURT OF COMMON PLEAS

Cherry T. Scott, as Personal Representative)
of the Estate of Elizabeth Jones,)

Civil Action No. 10-CP-25-491 & 492

Plaintiff,)

v.)

**NOTICE OF MOTION AND MOTION TO
RECONSIDER**

Heritage Healthcare of Estill, LLC d/b/a)
Heritage of the Lowcountry and/or d/b/a)
Uni-Health Post Acute Care of the)
Lowcountry, United Clinical Services, Inc.,)
United Rehab, Inc., and UHS-Pruitt)
Corporation,)

Defendants.)

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Defendants Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry and/or d/b/a Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (collectively "Defendants"), hereby move this Court for reconsideration of its Order Denying Defendants' Motion to Compel Arbitration dated November 3, 2011, and filed November 9, 2011. Counsel for Defendants received "written notice of the entry of the order" on November 16, 2011. Accordingly, this motion is timely pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure.

The basis for this motion is that the Court's Order addresses five issues raised by the Plaintiff in opposition to the Defendants' Motion to Compel Arbitration, and the Defendants respectfully submit that this Court should reconsider its ruling on these five issues, discussed below.

"[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes." Herron v. Century BMW, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" Shearson/Amer. Exp., Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

The language of the Federal Arbitration Act (FAA) is not permissive, but instead mandates enforcement of arbitration agreements. Section 4 of the FAA provides, in pertinent part as follows:

The courts shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985).

The only two inquiries relevant to the enforcement of an arbitration agreement under the FAA are (1) whether the parties entered into a valid arbitration agreement; and (2) whether the dispute is within the scope of the arbitration agreement. If both of these questions are answered in the affirmative, "the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). In resolving this inquiry, the arbitration agreement at issue must be treated as any other contract and not subjected to greater scrutiny because it is an arbitration agreement. Instead, any doubts regarding

arbitrability must be resolved in favor of arbitration. See Doctor's Assoc., Inc. v. Casarotto, 517 U.S. 681, 686 (1995); Allied-Bruce Terminix v. Dobson, 513 U.S. 265 (1995).

Because a threshold issue involves the applicability of the FAA, the Court's ruling on this issue will be addressed first.

I. The Court's Ruling that the FAA Does Not Apply Due to the Lack of Interstate Commerce Is Based on an Outdated and Overly Restrictive View of Interstate Commerce

The FAA provides, "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract...shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." 9 U.S.C. § 2 (cited in Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 592 S.E.2d 50 (Ct. App. 2004)). Furthermore, the FAA applies in federal or state court to any arbitration agreement that "in fact" involves interstate commerce, regardless of whether or not the parties contemplated an interstate transaction. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 542 S.E.2d 360 (2001)¹ (citing Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265 (1995); Soil Remediation Co. v. Nu-Way Envtl., Inc., 323 S.C. 454, 476 S.E.2d 149 (1996)).

The South Carolina Court of Appeals in Thornton succinctly stated:

The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.' Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995); see also Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 56, 123 S.Ct. 2037, 2040, 156 L.Ed.2d 46 (2003) ('We have interpreted the term 'involving commerce' in the FAA as the functional equivalent of the more familiar term 'affecting commerce'-words of art that ordinarily signal the broadest permissible

¹ Munoz expressly overruled Mathews v. Fluor Corp., 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent that the Mathews court considered "whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." Munoz, at n. 3.

exercise of Congress' Commerce Clause power.'). Blanton v. Stathos, 351 S.C. 534, 540, 570 S.E.2d 565, 568 (Ct. App. 2002) ('The United States Supreme Court has held that the phrase 'involving commerce' is the same as 'affecting commerce,' which has been broadly interpreted to mean Congress intended to utilize its powers to regulate interstate commerce to its full extent.'). 'Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.' Citizens Bank, 539 U.S. at 56, 123 S.Ct. at 2040.

Thornton, 357 S.C. at 95, 592 S.E.2d at 52 (internal citations and quotations in original).

This Court based its decision on Timms v. Greene, 310 S.C. 469, 427 S.E.2d 642 (1993). As raised at oral argument, this case was decided before Allied-Bruce was issued by the United States Supreme Court and clarified the reach of the FAA in areas of interstate commerce. The only factor analyzed by the Timms court was whether the contract "on its face" evidenced interstate commerce. In fact, the Timms court further acknowledged that the nursing home seeking to enforce the arbitration agreement was a division of an out-of-state entity, marketed and hired employees outside of South Carolina, purchased a majority of goods and supplies outside of South Carolina, and received federal funding. Timms, 310 S.C. at 473, 427 S.E.2d at 644. The Timms court then held, "[a]lthough these factors *could evidence the Center's involvement in interstate commerce*, we find that their relationship to the agreement between the Center and the respondent is insufficient to form the basis of the contract between the parties." Id. (emphasis added). Given Allied-Bruce's explicit rejection of the limited analysis followed by Timms and now by this Court, i.e., only looking at the contract instead of the "commerce in fact" test, the Defendants respectfully request that this Court reconsider its ruling that interstate commerce is not involved in this case.

Following the United States Supreme Court's opinion in Allied-Bruce, courts determining whether a particular transaction or contract involves interstate commerce are

required to look beyond the agreement. See Nu-Way, 476 S.E.2d at 152 (stating that “the court must examine the agreement, the complaint, and the facts...”). Further, the parties have acknowledged that their transaction involved interstate commerce:

The Resident and the Facility acknowledge and agree that the Resident’s Arbitration Agreement effects [sic] a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

(Arbitration Agreement, Ex. A, ¶ 5).

This Court’s holding that the contractual provision acknowledging the involvement of interstate commerce is insufficient to invoke the FAA is unsupported and directly contradicted by prior cases. For example, as the South Carolina Supreme Court held in Munoz, “Here, the arbitration agreement which applies to ‘this contract and the relationships which result from this contract,’ provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms.” Munoz, 343 S.C. at 539, 542 S.E.2d at 363-364 (citing Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ., 489 U.S. 468 (1989)). Contrary to this Court’s holding, which likens the stipulation regarding interstate commerce to a stipulation of subject matter jurisdiction, the provision cited above is a choice of laws provision that should be upheld. See also Washburn v. Beverly Enterprises-Georgia, Inc., 2006 WL 2728627 (S.D. Ga. 2006) (FAA applied when parties stipulated the arbitration agreement “evidences a transaction in interstate commerce governed by the Federal Arbitration Act.”). Here, the parties did not stipulate to a matter of jurisdiction in the agreement; they simply acknowledged the fact that interstate commerce was involved in the transaction. Moreover, because the arbitration agreement expressly provided for the application of the FAA, it should be upheld as a standard choice-of-law provision. Munoz, *supra*; Volt, *supra*; and In re

Ledet, 2004 WL 2945699 (Tex. App.-San Antonio 2004) (holding that when parties agree to arbitrate under the FAA, no independent showing of interstate commerce is necessary).

In addition to the stipulation cited above, the Defendants have provided sufficient evidence that interstate commerce is involved in this case such that the FAA applies. Most notably, there are three out-of-state defendants in this case. These defendants, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation, all admitted in their responsive pleadings that they were out-of-state corporations that provided services in Hampton County, South Carolina.² The fact that these foreign defendants denied additional, more specific allegations has no bearing on whether interstate commerce was involved pursuant to Allied-Bruce and South Carolina case law following Allied-Bruce. Moreover, this Court's discussion in its Order regarding the fact that the arbitration agreement did not mention the out-of-state entities is precisely the limited analysis determined to be invalid under Allied-Bruce and in Nu-Way.³ Finally, the patient, Ms. Jones, received Medicare payments on her behalf that were paid to the nursing home, and this source of federal funding directly implicates the involvement of interstate commerce.

Numerous courts from this State and from around the country have held that interstate commerce is involved in nursing home arbitration agreements such that the FAA applies, and in fact, many times it is not even a contested issue. See *Order Granting Motion to Compel Arbitration dated September 13, 2011, THI of S.C. v. Wiggins*, CA No. 3:11-888-CMC (D. S.C. 2011);⁴ *Order Granting Motion to Compel Arbitration dated December 21, 2009, Harris, et al. v.*

² See Exhibits 13, 14, and 15 to Pl.'s Memo in Opp. to Motion to Compel Arbitration. Additionally, the fact that the arbitration agreement is a form contract and not specifically limited to the State of South Carolina indicates the use by Defendants in multiple states. See Oesterle v. Atria Mgmt. Co., LLC, 2009 WL 2043492 (D. Kan. 2009).

³ Nu-Way, 476 S.E.2d at 152 (South Carolina Supreme Court stating that "the court must examine the agreement, the complaint, and the facts..." to determine if interstate commerce is involved)

⁴ Attached as Exhibit B.

UHS-Pruitt, et al., CA No. 2009-CP-40-0891 (Rich. County Court of Common Pleas);⁵ *Order Granting Motion to Compel Arbitration dated December 21, 2009*, Archie v. UHS-Pruitt, et al., CA No. 2009-CP-40-0892 (Rich. County Court of Common Pleas);⁶ *Order Granting Motion to Compel Arbitration dated January 11, 2010*, Boland v. Unihealth Post Acute Care, CA No. 2009-CP-40-1611 (Rich. County Court of Common Pleas);⁷ Oesterle v. Atria Mgmt. Co., LLC, 2009 WL 2043492 (D. Kan. 2009) (involving out-of-state defendants and form contract used in different states); Vicksburg Partners, L.P. v. Stephens, 911 So. 2d 507 (Miss. 2005), *overruled on other grounds* (recognizing that “[n]ursing homes through general practice, which includes basic daily activities like receiving supplies from out-of-state vendors and payments from out-of-state insurance companies or the federal Medicare program, affect interstate commerce” and taking notice of out-of-state defendants involved in the operation of the nursing home); Covenant Health & Rehabilitation of Picayune, LP v. Lumpkin, 23 So.3d 1092 (Miss. 2009) (noting that singular agreements between nursing homes and patients affect interstate commerce in the aggregate); Triad Health Mgmt. of Georgia III, LLC v. Johnson, 679 S.E.2d 785 (Ct. App. Ga. 2009) (recognizing expansive interpretation of interstate commerce and finding interstate commerce involved where nursing home had an out-of-state office and received federal funding for patients); Fosler v. Midwest Care Center II, Inc., 928 N.E.2d 1 (Ill. App. 2. Dist., 2009) (noting jurisdictions finding nursing home agreements to be subject to the FAA); McNally v. Beverly Enterprises, Inc., 191 P.3d 363, 2008 WL 4140635 (unpublished) (Ct. App. Kan. 2008) (same); Bales v. Arbor Manor, 2008 WL 2660366 (D. Neb. 2008) (involving stipulation in admission agreement that interstate activity was involved); Rainbow Health Care Center v. Crutcher, 2008 WL 268321 (N.D. Okla. 2008) (discussing broad reach of commerce clause in

⁵ Attached as Exhibit C.

⁶ Attached as Exhibit D.

⁷ Attached as Exhibit E.

nursing home case); Canyon Sudar Partners, LLC, v. Cole, 2011 WL 1233320 (S.D. W.Va. 2011) (same); Washburn, supra (stipulation rendered FAA applicable, and even without stipulation, the FAA would have applied because “nursing home care substantially affects interstate commerce in the aggregate and is also subject to federal control.”); Briarcliff Nursing Home v. Turcotte, 894 So.2d 661 (Ala. 2004) (interstate commerce involved due to nursing home’s out-of-state management and receipt of Medicare funds); and In re Nexion Health, 13 S.W.3d 67 (Tex. 2005) (Medicare payments alone were sufficient to establish interstate commerce under the broad interpretation required by Citizens Bank); *see also* Ivey v. Horton, 2008 WL 2717863 (D. S.C. 2008) (recognizing broad reach of Allied-Bruce); McCollum v. Tenet Healthcare Corp., 2006 WL 3373096 (D. S.C. 2006) (recognizing payments from federal sources such as Medicaid and Medicare implicate interstate commerce).

In summary, this Court should reconsider its holding regarding the involvement of interstate commerce in this nursing home transaction because (a) the Order improperly limits its analysis to the face of the contract, ignoring the mandates of Allied-Bruce and subsequent South Carolina cases; (b) the Order overlooks the stipulation on the face of the contract and the involvement of out-of-state defendants; and (c) the Order fails to address the arguments raised at the hearing regarding the involvement of interstate commerce in a nursing home operation, including the receipt of federal funds for Ms. Jones’s care.⁸

II. The Arbitration Agreement Does Not Mandate the AAA as a Forum and, In Any Event, the AAA is Not Unavailable

The Court’s Order holds that the following language in the arbitration agreement is, in effect, a forum selection clause:

⁸ *See* Citizens Bank v. Alafabco, Inc., 539 U.S. 52 (2003) (holding that no elaborate explanation needed to show an impact on interstate commerce upon consideration of the ‘general practice’ those transactions represent). Additionally, the admissions documents confirming the receipt of Medicare funds are attached as Exhibit F.

Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement *shall follow the rules of the American Arbitration Association ("AAA")* and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceedings shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator *selected in accordance with the rules of the AAA*. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

(emphasis added).

As raised at the hearing, the Defendants' position is as follows: (1) the arbitration agreement does not mandate the AAA as the forum; (2) if the Court finds that the arbitration agreement mandates the AAA as the forum, the Defendants submit that the AAA is not unavailable; and (3) if the Court finds that the arbitration agreement mandates the AAA as the forum *and* is now unavailable, the Defendants submit that the forum selection was not an integral part of this agreement such that the entire agreement to arbitrate is now invalidated.

A. The AAA is Not a Required Forum

In holding that there is no distinction between a chosen "forum" and an agreement that the parties will use the AAA "rules," this Court's Order overlooks numerous cases from various jurisdictions. Accordingly, this Court should reconsider its ruling that the arbitration agreement requires the AAA to be the forum for arbitration and uphold the validity of the arbitration agreement.

Numerous courts have addressed this issue following the AAA's Policy Statement⁹ and have correctly recognized the distinction between an arbitration conducted according to the AAA rules and an arbitration administered by the AAA. The following cases are instructive.

⁹ It is important to note that AAA issued its Policy Statement effective January 1, 2003, which is not a rule under the AAA. Other cases, including Grant v. Magnolia Manor, 383 S.C. 125, 678 S.E.2d 435 (2009), have addressed a similar issue involving the National Health Lawyers' Association (NHLA), who issued a *rule* change requiring a post-injury agreement to arbitrate before accepting arbitration. Those cases are distinguishable, in part, because of

In Mathews v. Life Care Centers of America, Inc., 177 P.3d 867 (Ariz.App. Div. 1, 2008), the Arizona Court of Appeals reversed the trial court's denial of the defendants' motion to compel to arbitration. In that nursing home case, the arbitration agreement specified that any arbitration hearing would be held before "a board of three arbitrators, selected from the American Arbitration Association [AAA]." The Mathews court held that the term regarding the selection of arbitrators from the AAA did not void the agreement following the Policy Statement because the term simply provided the manner of selecting the arbitrator and did not require a particular forum. This is similar to the arbitration agreement in the present case.

In Blue Cross/Blue Shield v. Rigas, 923 So.2d 1077 (Ala. 2005), the Alabama Supreme Court reversed the trial court's denial of a motion to compel arbitration. The arbitration agreement specified that binding arbitration would proceed "under the Federal Arbitration Act and according to the rules and procedures" of the AAA. The Rigas court held that the AAA Policy Statement does not preclude arbitration, as the provision only provided for the arbitration to be conducted according to the AAA rules and procedure. The Rigas court also distinguished between the administration of an arbitration by the AAA, which was not present in the Rigas arbitration agreement nor is it present in the arbitration agreement in this case, and the use of the AAA's rules and procedures. The court concluded, "the statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that Rigas' claims are not arbitrable." Rigas, 923 So.2d at 1092.

In Covenant Health v. Moulds, 14 So.3d 695 (Miss. 2009), the Mississippi Court of Appeals addressed an arbitration agreement that specifically required arbitration to be administered by the AAA. The Moulds court held that the arbitration could not go forward

the difference in the AAA's Policy Statement, which does not render arbitration agreements invalid, and the NHLA's rule change, which mean that arbitrations following those rules would fall under that change.

based on the AAA Policy Statement. However, the court recognized the distinction in cases between arbitration agreements requiring AAA "administration" and arbitration agreements requiring the use of AAA rules. Moulds, 14 So.3d at 708-709 (citing Mathews, *supra*, and Rigas, *supra*). The Moulds court recognized the distinction between following AAA rules and requiring AAA administration, namely that AAA administration is a requirement that mandates a forum while following AAA rules does not require a particular forum. This Court should reconsider its ruling that does not distinguish between the AAA's administration as a forum and the use of AAA's rules and procedures, which is not a forum.

In Fellerman v. American Retirement Corp., 2010 WL 1780406 (E.D. Va. 2010), the U.S. District Court for the Eastern District of Virginia granted the defendant's motion to compel arbitration. The arbitration agreement in Fellerman provided that the arbitrator must be a member of the AAA and that the arbitration proceedings would be governed by the rules of the AAA. The plaintiff argued that the distinction between arbitration clauses calling for parties to be bound by AAA rules versus those calling for AAA administration was immaterial, just as this Court has held in the present case. The Fellerman court explicitly rejected this argument. In fact, it addressed Rule R-2¹⁰ of the AAA and concluded that authorization to administer arbitration by using AAA rules "does not rise to the level of contractual assent to have the matter *exclusively* before that forum." Fellerman, at *5. The reasoning in Fellerman is sound and should be adopted by this Court, as Fellerman recognized that clear difference between AAA administration and AAA rules:

Several other jurisdictions have weighed in on whether an arbitration clause binding the parties to AAA rules is integral. As ARCIP points out, courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA. Mathews v. Life Care

¹⁰ Rule R-2 states that when parties agree to arbitrate "under these rules....they thereby authorize the AAA to administer the arbitration."

Ctrs. of Am., Inc., 217 Ariz. 606, 177 P.3d 867, 868 (2008) (enforced agreement that required AAA arbitrators, but not AAA administration); Blue Cross Blue Shield v. Rigas, 923 So.2d 1077, 1093 (Ala.2005) (enforced agreement that required AAA rules, but not AAA administration); Estate of Eckstein v. Life Care Ctrs. of Am., Inc., 623 F.Supp.2d 1235, 1238 (E.D.Wash.2009) (same); Oesterle v. Atria Mgmt. Co., LLC, No. 09-4010-JAR, 2009 U.S. Dist. LEXIS 60057, at *26, 2009 WL 2492697 (D.Kan.2009) ('[T]he appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA's policy.'). The arbitration agreement in this action, unlike that at issue in Moulds, specifies only that arbitration proceed in accordance with AAA rules (ARCIP Mem. in Supp. Mot. to Compel Arbitration, Ex. 1). This interpretation is most consistent with the strong federal presumption favoring arbitration. See Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

Id.

In Nail v. Consolidated Resources Health Care Fund I, 229 P.3d 885 (Wash.App. Div. 3, 2010), the Washington Court of Appeals reversed the trial court's denial of defendants' motion to compel arbitration. The arbitration agreement in Nail called for arbitrators to be selected from AAA and to apply the rules of procedure of the AAA. After determining that the AAA Policy Statement was *not* a rule of procedure, the Nail court held that the "AAA did not, and could not invalidate all pre-dispute arbitration agreements regarding individual health care claims unsupported by an additional post-dispute arbitration agreement" and noted that the AAA did not legislate its policy statement into a specified rule of procedure. Id. at 889. The Nail court also correctly noted that in specifying the method of choosing arbitrators, the agreement did not require exclusive AAA administration. The Defendants respectfully request that this Court reconsider its ruling in this case to the contrary.

In Oesterle, *supra*, the U.S. District Court for the District of Kansas addressed a motion to compel arbitration in which the arbitration agreement provided that the arbitration would be

conducted in accordance with the rules of the AAA, but that arbitration would be held in the state where the facility was located. In many ways, the arbitration agreement at issue in Oesterle is most similar to the arbitration agreement in the present case. The Oesterle court reconciled the arbitration agreement with the AAA Policy Statement by concluding:

Guided by the Supreme Court, this Court finds that the appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA's policy. And while plaintiff argues that her reading of the provision is the correct one, 'such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms.' Indeed, the parties may contractually limit the issues that they will arbitrate and may specify the rules to govern any such arbitration. There is nothing in the FAA that prevents parties from enforcing arbitration provisions under different rules than those in the FAA. Where the parties have decided to arbitrate in accordance with AAA rules, enforcing that decision is certainly consistent with the FAA.

Id. at *9 (internal citations omitted). The Oesterle court also noted that a consistent reading of the arbitration provision would be that the parties could pursue arbitration based on AAA rules but not administer the arbitration process through the AAA. This is the exact distinction and reading of the arbitration agreement that Defendants submit is proper in this case.

In Deeds v. Blueshield of Idaho, 141 P.3d 1079 (Idaho 2006), the Supreme Court of Idaho reversed the trial court's denial of a motion to compel arbitration. In Deeds, the arbitration agreement provided for arbitration "in accordance with the applicable rules of the AAA." The court in Deeds concluded that even if the AAA would not designate an AAA arbitrator to administer the dispute in light of the Policy Statement, it saw "no reason" why the arbitration could not proceed in accordance with the AAA rules using a different arbitrator.¹¹ The Deeds court added that the AAA rules governing a dispute are simple procedural rules of general

¹¹ In the present case, the arbitration agreement only calls for a "neutral arbitrator" selected in accordance with AAA rules and *not* an AAA arbitrator.

applicability, which can be followed by any duly appointed arbitrator. Id. at 1081-1082; *see also* Trinity Mission Health & Rehab. v. Scott, 19 So.3d 735 (Miss. App. 2008) (“While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA’s rules and procedures would still be possible.”); Boland, *supra* (general principles of contract law require a finding that the arbitration must simply follow the rules of AAA and not have the AAA administer the arbitration as the forum); Wiggins, *supra* (arbitration agreement required arbitration to be administered by the NHLA, and court treated this provision as specifying the arbitral forum); Harris, *supra* (arbitration agreement providing for use of AAA rules not impacted by AAA Policy Statement because arbitration agreement, by its express terms, can be enforced without any involvement of the AAA); Archie, *supra* (same). As the courts in Harris and Archie noted:

I also note that the AAA’s Healthcare Policy Statement does not preclude arbitration of the parties’ dispute. The AAA’s ‘Healthcare Policy Statement’ states that “[a]s a result of its review of its caseload in the healthcare arena....it will no longer accept the administration of cases involving patients *without a post-dispute agreement to arbitrate.*” The AAA is not a party to the Arbitration Agreement, and Congress has not authorized AAA to override the policy favoring arbitration expressed in the FAA. Accordingly, the AAA is not empowered to invalidate the Arbitration Agreement.

Harris, at p. 10, Archie, at p. 10 (emphasis in original).

As previously stated, it is also important to note that the arbitration agreement does not require the arbitrator to be a member of the AAA. The only requirement is that the arbitrator is “neutral” and selected in accordance with the rules of the AAA. Moreover, the fact that the arbitration agreement calls for the arbitration to be conducted where the facility is located by a neutral arbitrator is clear evidence that the AAA is not the forum where the arbitration will be

administered. See Warner v. Weader, 280 S.C. 81, 311 S.E.2d 78 (1983) ("Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in the plain, ordinary, and popular sense"). Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. C.A.N. Enterprises, Inc. v. S.C. Health and Human Serv. Fin. Comm'n, 296 S.C. 373, 373 S.E.2d 584 (1988). Thus, just as the arbitration agreement does not mandate a forum that is now unavailable, the manner of selecting the arbitrator is not impossible. Even if it were, the manner of selecting an arbitrator may be accomplished by the procedure outlined in 9 U.S.C. § 5 of the FAA.¹²

Accordingly, the Defendants respectfully submit that the arbitration agreement in this case does not mandate that the AAA serve as the forum for this arbitration. By only requiring the use of the AAA rules and a neutral arbitrator, the arbitration agreement is not impacted by the AAA Policy Statement. Courts across the country have drawn a distinction between "administration" of the arbitration by the AAA and the general use of the AAA's rules and procedures, and the Defendants would ask this Court to reconsider its ruling. If the Court were to hold that the Policy Statement did not invalidate the arbitration agreement, then consideration of the Defendants' remaining arguments on this issue is not necessary. Regardless, the Defendants will address the remaining issues below.

B. Even if the AAA is the Designated "Forum," the AAA is Not Unavailable Such That the Agreement is Invalidated

Assuming that the arbitration agreement mandates that AAA is the exclusive forum for arbitration, the Defendants submit that the Policy Statement does not render the agreement

¹² Section 5 provides a method for appointing arbitrators, including substitute arbitrators.

unenforceable. Even if the arbitration agreement is read to require AAA arbitrators to conduct the arbitration, the proper remedy is found in the FAA for the appointment of another arbitrator.

First and foremost, it is undisputed that the AAA Policy Statement simply requires a post-injury agreement to arbitrate. If, as Plaintiff has argued and this Court has held in its Order, the selection of AAA as a forum was integral to the parties' agreement, then the Plaintiff can simply follow through on her agreement to arbitrate through AAA by filing her demand for arbitration there. A close review of the language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its forum for all healthcare disputes in general or to Plaintiffs' dispute in particular. Instead, the Policy Statement is based solely on AAA's "review of its caseload in the healthcare arena."¹³

Again, the AAA can and will administer the arbitration with nothing more than a signed submission agreement by the parties. Defendants have indicated their willingness to perform whatever formalities may be required by the AAA to have this dispute resolved in the forum that Plaintiff claims to prefer. The Plaintiff cannot avoid her obligation to arbitrate by creating an artificial obstacle to the performance of her obligation. See Tate v. Lemaster, 231 S.C. 429, 99 S.E.2d 39 (1957) (recognizing general rule that a party to a contract cannot avoid its obligation upon the ground that the other party has not fulfilled a condition precedent to such liability when he himself has prevented such fulfillment); Huffines Co. v. Lockhart, 365 S.C. 178, 617 S.E.2d 125 (Ct. App. 2005) (party may not claim protection of a condition precedent which he prevents from occurring); see also New Port Richey Medical Investors, LLC v. Stern, 14 So.3d 1084 (Fla.App. 2 Dist. 2009) (holding that the parties' arbitration agreement is not rendered invalid or unenforceable simply because the AAA is unavailable to conduct the arbitration). Therefore, the

¹³ See Exhibit 8 to Pl.'s Memo. in Opp. to Mot. to Comp. Arbitration.

Policy Statement does not preclude arbitration even if the agreement requires AAA administration.

Finally, if this Court were to consider that the AAA is involved in the parties' agreement by virtue of affecting the manner of selection of the arbitrator,¹⁴ there is no question that the FAA provides a remedy in 9 U.S.C. § 5. As such, the manner of selecting an arbitrator is not unavailable. See Stern, *supra* (holding arbitration agreement was enforceable and a substitute arbitrator must be appointed); Scott, *supra* (same); Deeds, *supra* (Court saw "no reason, however, why the arbitration cannot proceed 'in accordance with the applicable rules of the AAA' using a different arbitrator"); Eckstein v. Life Care Centers of Amer., Inc., 623 F.Supp.2d 1235 (E.D. Wash. 2009) (holding that AAA is not unavailable because of the FAA's provisions for appointment of a successor arbitrator); Nail, *supra* (holding that solely the method for arbitrator selection failed, but the arbitration agreement was still enforceable upon remand for appointment of successor arbitrator); and Mathews, *supra* (holding that trial court correctly ruled that substitute arbitrator could be appointed in case where arbitration agreement required arbitrator to be held before a panel of three arbitrators selected from the AAA).

Accordingly, this Court's Order that finds either the forum or the method of selecting an arbitrator is unavailable should be reconsidered. Under established South Carolina case law and cases in other jurisdictions, the forum is not unavailable when the only obstacle is the Plaintiff's consent. Furthermore, the selection of an arbitrator, if deemed to be unavailable under the arbitration agreement, should be accomplished by resorting to the provisions of the FAA.

C. Even if the Forum and/or Method of Selecting an Arbitrator is Unavailable, the Forum Selection in this Case is an Ancillary Logistical Concern

¹⁴ As previously stated, because the arbitration agreement calls for a "neutral arbitrator" selected in accordance with the rules of the AAA, the arbitration agreement, by its express terms, can be enforced without any direct involvement of the AAA.

This Court's Order relies on Grant v. Magnolia Manor in holding that the selection of the AAA rules in this case was an integral part of the agreement. As an integral part of the agreement, this Court held that the FAA's substitute provisions are not applicable.

This Court's Order overlooks several differences between this case and the facts in Grant. First, in Grant, the arbitration agreement mandated arbitration administered by the National Health Lawyers Association (NHLA). There is no such strong pronouncement in the arbitration agreement before this Court regarding the *administration* of the arbitration. As the Grant court emphasized, the parties specified an exclusive arbitral forum. See Grant, 678 S.E.2d at 438-439 ("There is a dispute in the case law as to whether Section 5 [of the FAA] applies in cases where, as here, the parties have specified an exclusive arbitral forum...." and "We see great merit in the Second Circuit's view that Section 5 does not apply in cases where a specifically designated arbitrator becomes unavailable" and "...in our view, the specific designation of the AHLA as arbitrator is an integral term of this arbitration agreement.").

Unlike Grant, the present case involves the scenario where the arbitration agreement only calls for the rules of the FAA to be applied. Additionally, the agreement only calls for a "neutral arbitrator" and requires the arbitration take place as close to the facility as possible. Clearly, in this case, the choice of forum, if deemed to include the provision of the AAA rules, is an ancillary concern because there is no requirement that the AAA administer the arbitration.

Secondly, this Court's conclusion that the provisions relating to the AAA rules were integral parts of the agreement is simply conclusory and not supported by any evidence before this Court. In fact, this Court's holding that the AAA provisions were integral to the Plaintiff is directly contradicted by the testimony of Ellen Jenkins, Ms. Jones' sister. Ms. Jenkins signed the paperwork for Ms. Jones' admission to Lowcountry, and Ms. Jones understood that Ms. Jenkins

was doing so.¹⁵ Ms. Jenkins, who signed the arbitration agreement, could not recall anything specific about the documents she signed,¹⁶ and she does not remember if she read the arbitration agreement.¹⁷ It is illogical to conclude that the AAA provisions were an integral portion of the arbitration agreement when the person who executed the documents does not recall reading *any* of the agreement. *See, e.g., Stern, supra* (substitute arbitrator provisions proper where plaintiff did not present any evidence that the choice of the AAA as the forum was an integral part of the agreement to arbitrate); *Deeds, supra* (substitute provisions of FAA proper because there was no evidence that AAA provisions were central to the agreement to arbitrate because "the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration..."); *Mathews, supra* ("Moreover, the record contains no evidence that an AAA arbitration panel was a significant or material term to [plaintiff] when she executed the Agreement."); *Eckstein, supra* ("Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term."); *Wiggins, supra* (Judge Currie holding that no evidence was presented that plaintiff was aware of the existence of the AHILA rules or possible conflict).

Again, if the AAA provisions in the arbitration agreement were integral to the parties, and if the AAA's availability is conditioned upon Plaintiff agreeing to arbitrate under the AAA rules, there is an inconsistency in this Court's conclusion. In other words, it is inconsistent for Plaintiff to refuse to submit her claim to the AAA, while at the same time claiming that AAA administration was an integral part of the arbitration agreement.

¹⁵ Deposition testimony of Ellen Jenkins, p. 9, ll. 2-24. Ms. Jenkins' deposition transcript was attached to the Def.'s Memo. in Supp. of its Mot. to Comp. Arbitration as Exhibit B.

¹⁶ Deposition testimony of Ellen Jenkins, p. 13, ll. 4-17.

¹⁷ Deposition testimony of Ellen Jenkins, p. 14, ll. 19-25.

Briefly, the AAA rules cited by this Court do not void the distinction between “forum” and “rules.” For example, the parties could have agreed that the Federal Rules of Civil Procedure would govern the arbitration even if there was no federal court jurisdiction. As previously stated, Rule R-2 does not make AAA the exclusive administering body of the arbitration, as it simply states that AAA could administer the arbitration if the parties chose. Likewise, Rules R-3, R-49, and R-51 would only apply in arbitrations where AAA is administering the arbitration. Furthermore, the copyrighting prohibition certainly does not mean that the AAA rules can only be used in such limited proscriptions as the AAA administration of an arbitration.

In conclusion, this Court’s Order overlooks the two main principles of arbitration. First, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) (cited in Grant v. Magnolia Manor, 383 S.C. 125, 678 S.E.2d 435 (2009)). Second, a motion to compel arbitration should only be denied where the clause is not susceptible to *any* interpretation which would cover the asserted dispute. *Id.* The Defendants respectfully submit that the Court reconsider its rulings on the availability of the AAA, whose rules are to be followed under the agreement, and grant the Defendants’ Motion to Compel Arbitration.

III. Meeting of the Minds/Standing¹⁸

This Court’s Order finds that there was no meeting of the minds as to the essential parts of the contract, but it only cites to the testimony of Sally Dobson, an employee of Lowcountry Healthcare. Certainly, there was a meeting of the minds because Ms. Jones was granted admission to the facility and stayed there for some period. The admissions agreements, which

¹⁸ Although this Court’s Order addresses “meeting of the minds” and “standing” in two separate sections, the Defendants have addressed these two issues in one section below.

include the arbitration agreement, were never repudiated or questioned after Ms. Jones was admitted. Moreover, Ms. Jenkins acknowledged that she signed the arbitration agreement, despite not being able to recall the specifics of the agreement. The South Carolina Supreme Court recently held that failure to read an arbitration agreement is not a defense:

The [plaintiffs] both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century's actions. Our jurisprudence forbids us to allow the [plaintiffs] to invalidate the enforceability of the arbitration agreement by claiming they did not read it.

Herron v. Century BMW, 387 S.C. 525, 533, 693 S.E.2d 394, 398 (2010) (citing Regions Bank v. Schmauch, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (citing Sims v. Tyler, 276 S.C. 640, 281 S.E.2d 229 (1981)) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it."). Finally, contracting intent of parties to a contract is determined by the written language in the contract, not by the subjective thoughts of either party to the contract. Therefore, Sally Dobson's knowledge or lack of knowledge of the exact parameters of the arbitration agreement is irrelevant as to whether the written contract evidences a certain undertaking by the parties to arbitrate.¹⁹

As to standing, the validity of the arbitration agreement in this case must be determined in accordance with the general principles of contract law in South Carolina that would apply to any other contract. Herron, 387 S.C. at 531, 693 S.E.2d at 397. By allowing Ms. Jenkins to procure her admission to Lowcountry and accepting the benefits of the contracts entered into in connection with that admission, Ms. Jones represented that Ms. Jenkins was authorized to act on her behalf in connection with her admission. See R&G Construction, Inc., v. Lowcountry

¹⁹ By Plaintiff's logic, a wholly unambiguous loan agreement could be wiped out by the testimony of a loan officer that did not fully understand each and every provision in the loan documents. Such a position is absurd, particularly where, as in this case, the person signing the agreement admits that she was not misled by Sally Dobson and did not rely on Sally Dobson to explain the loan agreement to her.

Regional Transp. Auth., 343 S.C. 424, 433, 540 S.E.2d 113 ("When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances."). In the present case, the evidence is undisputed that Ms. Jones authorized Ms. Jenkins to negotiate her admission to Lowcountry.

Additionally, Ms. Jones accepted the benefits of these contracts with Lowcountry, and as such she ratified them through her conduct, i.e. remaining at Lowcountry, and should be equitably estopped from denying their validity. The Court noted that Ms. Jones was mentally competent at the time of her admission, and this is even *greater* evidence that Ms. Jenkins was authorized to act on her behalf. If Ms. Jenkins was not authorized to act on her behalf, and Ms. Jones was competent, certainly Ms. Jones would have not stayed at Lowcountry. One cannot ratify that part of the contract under which she has accepted the benefits and avoid that part which she later deems to be disadvantageous. Southern Bell Telephone & Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 59 S.E.2d 146 (1950).

As stated in its Memorandum in Support of the Motion to Compel Arbitration, the execution of the arbitration agreement was knowing and voluntary. The arbitration agreement advises of the right to contact an attorney to obtain further explanation, and Ms. Jenkins represented above her signature that she had been given the opportunity to read the arbitration agreement and understand its contents.

Moreover, Ms. Jones is bound by the contract executed by Ms. Jenkins as a third-party beneficiary. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." Helms Realty, Inc. v. Gibson-Wall Co., 611 S.E.2d 485, 488

(2005); *see also* Touchberry v. Florence, 367 S.E.2d 149, 150 (1988) (“[t]he presumption that [a] contract is not enforceable by an individual may be overcome by showing that he was intended to be the direct beneficiary of the contract.”). Again, Ms. Jones did not sign the contract, but she clearly is the resident to be admitted to the facility and thus the direct beneficiary. Ms. Jones’ care was the essential purpose of the admissions agreement, and as a third-party beneficiary, she (and her estate) are bound by the arbitration agreement. *See Wiggins, supra* (rejecting argument that family member did not have authority to bind resident to arbitration); Cook v. GGNSC Ripley, LLC, 2011 WL 1439458 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); Owens v. Coosa Valley Health Care, Inc., 890 So.2d 983 (Ala. 2004) (same); Scott, supra (same).

IV. Waiver

At the outset, the Defendants submit that once it has been determined that a valid arbitration agreement has been entered, the matter must be sent to arbitration. The arbitrator would then have the authority to rule on any defenses, such as waiver, that may be raised by the Plaintiff. Thus, the issue of waiver is not properly before this Court. Nonetheless, the Defendants will address this Court’s Order.

The three factors generally considered to determine if a party has waived its right to enforce arbitration include: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking arbitration engaged in extensive discovery; and (3) prejudice to the non-moving party which must be more than mere inconvenience. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

This Court's Order overlooks several important facts with respect to its analysis of the time between commencement of the action and the motion to compel arbitration. First, the Complaint was filed on October 13, 2010. Although a Notice of Intent was required before the Complaint was filed, the Defendants' contractual right to arbitrate was not breached until the Complaint was filed. Given the courts' policy to encourage settlement of disputes through mediation, participating in the required pre-suit mediation should not be held against the Defendants for purposes of calculating the purported time lapse between notice of a dispute and moving for arbitration. The only relevant date is the filing of the Complaint, which was the first time that agreement to arbitrate was breached.

Furthermore, *one week* after the Defendants answered the Complaint, the Plaintiff moved to strike the portions of the Defendants' Answers that raised arbitration as a defense. At that point, the Defendants were not required to file a Motion to Compel Arbitration, as the arbitration issue was immediately raised by the Plaintiff. The parties did not have a hearing on Plaintiff's Motion to Strike until February 2011, and the court did not rule on the motion regarding arbitration until March 4, 2011. After the court denied the Plaintiff's Motion to Strike the arbitration defenses, the Defendants conducted limited discovery *solely* on the issue of arbitration, which included depositions of the individuals who signed the arbitration agreement.²⁰ The depositions occurred in May 2011 and after receiving the transcripts in July 2011, the Defendants moved to compel arbitration on August 4, 2011. Therefore, the lapse of time was less than ten months from the filing of the Complaint, and the justification for the passage of time was reasonable given the fact that the arbitration issue was immediately raised *by the Plaintiff*.

²⁰ Certainly, if the Defendants had immediately moved to compel arbitration, the Plaintiff's first argument would be that she is, at least, entitled to discovery on the issue of arbitration, such as on the issue of meeting of the minds and standing.

As to the issue of engaging in discovery, the Defendants only requested limited discovery on the issue of arbitration. Although this Court's Order finds that the Defendants "decided to participate in procedural and discovery hearings" and "repeatedly availed themselves of the court system," this finding is erroneous in that the Defendants appeared in court to defend motions filed by the Plaintiff. As to the Defendants' production of documents, the Court is improperly punishing the Defendants for cooperating by responding to the Plaintiff's discovery requests. In other words, the Defendants are in a no-win situation because (a) if they refuse to answer discovery unrelated to arbitration, they will have to defend a motion to compel and thus "avail ourselves of the court system" or (b) if they attempt to cooperate with Plaintiff's discovery requests, they are "participating" in discovery. Because the Defendants limited their discovery in the form of depositions and limited requests to Plaintiff, this Court should reconsider its ruling that Defendants engaged in extensive discovery.

Finally, as to the issue of prejudice, the Plaintiff cannot claim prejudice when the issue of arbitration has been apparent from the very beginning of this case. The Plaintiff raised the issue of arbitration one week after an Answer was filed and cannot now claim surprise or prejudice that the Defendants would move to compel arbitration. The Defendants have attempted to follow a logical progression towards a Motion to Compel arbitration in that after the Motion to Strike the arbitration defense was resolved in March 2011, they conducted limited discovery on the arbitration issue (which again, the Plaintiffs would have demanded). After deposing Ms. Jenkins and Ms. Scott, the personal representative of Ms. Jones' estate, the Defendants timely moved for arbitration. Furthermore, the costs expended by Plaintiff in discovery would have been otherwise borne in arbitration discovery.

The issue of arbitration has been at the forefront of this case from its inception, and the Plaintiff cannot claim prejudice at this stage when she has been aware from the beginning. See Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding that mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it occasions). Any doubts should be resolved in favor of arbitration, including the waiver issue. Towles v. United HealthCare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999). Numerous South Carolina courts have addressed waiver issues and have rejected plaintiffs' waiver defenses in cases similar to the present case. See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc., 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period where the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver); Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was limited in nature did not demonstrate waiver), and Rich v. Walsh, *supra* (no waiver even though parties exchanged discovery, conducted a brief deposition, and motion filed one year after suit began).

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. Sanford v. South Carolina State Ethics Com'n, 385 S.C. 483, 685 S.E.2d 600 (2009) (citing Eason v. Eason, 384 S.C. 473, 682 S.E.2d 804 (2009)). Waiver requires a party to have known of a right and known that right was being abandoned. *Id.* In this case, the Defendants have never acted in a manner contrary to their contractual right to arbitrate. The Defendants raised arbitration in their Answers after the Plaintiff initially breached the arbitration agreement. The Defendants then challenged the Plaintiff's Motion to Strike in order to enforce the arbitration agreement. Thereafter, the Defendants conducted discovery for the express purpose of enforcing

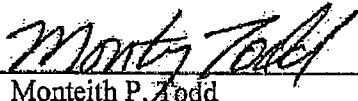
the arbitration agreement. The Defendants' conduct has been the *exact opposite* of a knowing and voluntary relinquishment of a known right. Accordingly, this Court's finding of waiver is unsupported by the record.

CONCLUSION

For the reasons set forth herein, as well as any additional grounds set forth in the Defendants' Memorandum in Support of its Motion to Compel Arbitration, the Defendants respectfully request this Court reconsider its ruling and grant the Motion to Compel Arbitration in this case.

Respectfully submitted,

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Attorneys for Defendants

Columbia, South Carolina
November 28, 2011

EXHIBIT A

Resident and Facility Arbitration Agreement

Please Read Carefully

It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or "Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.

1. Claims. For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such

damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.
5. Applicable Law. The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.
6. Right to Consultation. The Resident understands that the Resident has the right to consult an attorney of his or her choice about this Arbitration Agreement and to receive an explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature

Date

Elizabeth Jones

Printed Name of Resident/Patient

[Signature]

Resident's Authorized Representative

4-17-07

Date

Ellen Jenkins

Printed Name of Resident's Authorized Representative

Sally Adam, SSN

Facility's Authorized Agent

4-17-07

Date

Sally Dobson

Printed Name of Facility's Authorized Agent

Initial

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

THI of South Carolina at Columbia,
LLC, doing business as Magnolia Manor
of Columbia,

Plaintiff,

v.

Deborah J. Wiggins, as Personal Representative
of the Estate of Earl Hall,

Defendants.

C/A No. 3:11-888-CMC

OPINION AND ORDER

This matter is before the court on motion to compel arbitration filed by Plaintiff THI of South Carolina, LLC, doing business as Magnolia Manor of Columbia ("THI"), and on cross-motion for judgment on the pleadings filed by Defendant Deborah J. Wiggins ("Wiggins"). Dkt. Nos. 8, 28.

For the reasons set forth below, THI's motion, which is founded on the Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*, is granted and Wiggins' motion is denied.¹

THI's complaint and present motion arise from Wiggins' stated intent to take legal action to hold THI responsible for damages associated with the death of her father, Earl Hall ("Hall"). Hall died while a resident of Magnolia Manor of Columbia ("Magnolia Manor"), a residential health care center.² Although Wiggins has not yet instituted any legal action against THI, she has indicated an

¹ The complaint asserts a single cause of action to compel arbitration. Thus, Wiggins' motion under Rule 12(c) of the Federal Rules of Civil Procedure is simply the converse of THI's motion to compel arbitration.

² Because it is necessary at points in this order to distinguish between Defendant and the facility it operated, the court refers to Defendant as THI and to the facility itself as Magnolia Manor.

intent to move in state court to add or substitute THI as a judgment debtor on a default judgment she obtained against Magnolia Manor-Columbia, Inc., a distinct legal entity which apparently operated Magnolia Manor at some point in time.

THI moves to compel arbitration of this dispute based on an arbitration provision included in the Admission Contract ("Contract") through which Hall was admitted to Magnolia Manor. THI argues that this arbitration provision controls any dispute with THI regarding Hall's care at Magnolia Manor.

FEDERAL ARBITRATION ACT

As a threshold matter, a court may compel arbitration pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, if a litigant can demonstrate "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir.2005) (internal quotation omitted). In this matter, Wiggins contests the second element, arguing the dispute is not arbitrable because there is no valid and enforceable arbitration agreement.

When a question of arbitrability arises, the district court decides whether a matter should be resolved through arbitration. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S.Ct. 2847, 2859 (2010); *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986). This determination, however, is limited to a two-step inquiry: (1) whether a valid arbitration agreement exists; and (2) whether the specific dispute falls within the substantive scope of the arbitration agreement. *AT&T Tech.*, 475 U.S. at 651; *see Hooters of Am. v. Phillips*, 173 F.3d 933, 938 (4th Cir.

1999).³ The Supreme Court has consistently encouraged a “healthy regard for the federal policy favoring arbitration.” *Levin v. Alms and Assocs.*, 634 F.3d 260, 267 (4th Cir. 2011) (internal quotations omitted). “The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration.” *Id.* Though the FAA governs whether a dispute is arbitrable, courts must apply state law to decide issues of contract formation. *See Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005).

FACTUAL AND PROCEDURAL BACKGROUND

Arbitration Provision. Hall became a resident of Magnolia Manor on May 4, 2005. Dkt. No. 27 at 2. The first page of the Contract, which was executed on that date, states that it is “executed . . . by and among Magnolia Manor-COLA, a corporation located at 1007 N. King St. Columbia S.C. 29223 (the ‘Health Care Center’), and Earl Hall (‘Patient/Resident’), and/or Deborah Wiggins (‘Fiduciary Party’)[.]”⁴ Dkt. No. 1-1 at 1. The name “Earl Hall” is printed over the signature line for the Patient/Resident. Dkt. No. 1-1 at 4.⁵ Wiggins signed the Contract over the signature line for “Fiduciary Party” and marked the block indicating that she signed as an “Immediate Family Member.” The contract is also signed by Pearly Williams (“Williams”) a “Health Care Center Representative.” Williams and Wiggins signed three addenda to the Contract on the same date. Each of these documents identifies the “Health Care Center” as “MMOC, a THI

³ For an arbitration agreement to be subject to the FAA, it must involve interstate commerce. 9 U.S.C. § 2. The FAA has an expansive reach, similar to the Commerce Clause, such that an arbitration clause merely “affecting” interstate commerce would be covered by the statute. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 273-74 (1995). The parties here do not dispute that the FAA applies.

⁴ While Wiggins questions whether the capacity in which she signed is binding on her father’s estate, she does not dispute that she did, in fact, sign the Contract. .

⁵ For purposes of this order, the court assumes that Hall did not actually sign the Contract.

corporation.”

The Contract contains an Arbitration Provision, which states in pertinent part:

Pursuant to the Federal Arbitration Act, any action, dispute, claim or controversy of any kind (e.g., whether in contract or in tort, statutory or common law, legal or equitable or otherwise) now existing or hereafter arising between the parties in any way arising out of, pertaining to or in connection with the provision of health care services, any agreement between the parties, the provision of any other goods or services by [Magnolia Manor] or other transactions, contracts or agreements of any kind whatsoever, any past, present or future incidents, omissions, acts, errors, practices or occurrence causing injury to either party whereby the other party or its agents, employees or representatives may be liable, in whole or in part, or any other aspect of the past, present or future relationships between the parties shall be resolved by binding arbitration administered by the National Health Lawyers Association[.]

Dkt. No. 1-1 at 4 (“Arbitration Provision”).

State Court Action. In June 2009, Wiggins, acting as personal representative of her father’s estate, filed a civil action in state court alleging three causes of action which stemmed from care Hall allegedly received while a resident of Magnolia Manor: a survival claim for negligence, a wrongful death claim, and a claim of negligence *per se*. See Dkt. No. 7.⁶ Wiggins named Magnolia Manor-Columbia, Inc. as the sole defendant. *Id.* Despite participating in pre-litigation mediation, Magnolia Manor-Columbia, Inc. failed to file an answer or otherwise defend the state court action leading to entry of default judgment against it in the amount of approximately \$4.2 million. Dkt. No. 1 at 4. Wiggins has yet to collect the amount awarded. *Id.* Magnolia Manor-Columbia, Inc. has moved to set aside the default judgment. See Dkt. No. 34-7. That motion remains pending. See Dkt. No. 38 (responding to inquiry from this court).

⁶ The state court complaint alleges that those responsible for Hall’s care at Magnolia Manor were aware at the time of his admission that Hall had an increased risk of developing bedsores and, by August 2005, knew that he had an increased risk of falling. It further alleges that Hall died from complications of falls and bedsores on May 20, 2007. Dkt. No. 27 at 2.

In its complaint in this action, THI alleges that, at some point after default was entered, it became aware that Wiggins "intend[ed] to seek to have the default judgment in the [state court action] amended in order to substitute [THI] for Magnolia Manor-Columbia, Inc." Dkt. No. 1 at 4. On April 1, 2011, THI's counsel sent an electronic message to Wiggins' counsel in an effort to confirm whether Wiggins would be submitting her dispute against THI to arbitration. Dkt. No. 1 at 4-5. Wiggins' counsel responded that Wiggins refused to arbitrate her dispute with THI.⁷ *Id.* at 5.

On April 14, 2011, THI filed this action in federal court asserting a single cause of action to compel arbitration under Section 4 of the FAA. Dkt. No. 1. It filed the present motion the following day, seeking the same relief. Dkt. No. 8. Both the action and motion rest on the Arbitration Provision found in the Contract signed on the date of Hall's admission to Magnolia Manor.

Contracting Party. In the Complaint, Plaintiff describes its relationships and citizenship as follows:

Plaintiff [THI of South Carolina at Columbia, LLC, doing business as Magnolia Manor of Columbia] is a single-member Delaware limited liability company that is licensed to operate Magnolia Manor of Columbia ("Magnolia Manor"), a skilled nursing facility located at 1007 North King Street, Columbia, South Carolina. Plaintiff's sole member is THI of South Carolina, LLC, which itself has a single member, THI of Baltimore, Inc., a Delaware corporation with its principal place of business in Maryland. Thus, for purposes of diversity jurisdiction, Plaintiff is a citizen of the States of Delaware and Maryland.

Dkt. No. 1 ¶1. This statement is consistent with THI's response to Local Civil Rule 26.01

⁷ In her amended answer, Wiggins confirmed that "she intends to seek amendment of the [state court] judgment." Dkt. No. 29 at 2. On August 12, 2011, in response to an inquiry from this court regarding the status of the state court action, Wiggins stated that she has not yet moved for such an amendment. Dkt. No. 38. While she did not restate her intent to move to add THI as a judgment debtor, neither did she disavow that intent.

Interrogatory C:

Plaintiff is not a publicly owned company and no publicly owned company has an interest described above. Plaintiff is a Delaware limited liability company whose sole member is THI of South Carolina, LLC, which itself has a single member, THI of Baltimore, Inc., a Delaware corporation with its principal place of business in Maryland.

Dkt. No. 3 at 2.

Although Wiggins offered a general denial to the allegations of the complaint, including regarding THI's structure and ownership, she has offered no affirmative allegations pointing to error in THI's description. See Dkt. No. 29 (Amended Answer) ¶2 ("Responding to the allegations of paragraph 1 of the complaint, Defendant lacks sufficient knowledge regarding the corporate structure of Plaintiff to respond and therefore denies the same."); Dkt. No. 22 (Original Answer) ¶ 2 (same). Wiggins does, however, include a defense in which she asserts that "Plaintiff is an alter-ego of Magnolia Manor - Columbia, Inc., and therefore this action is barred by res judicata and constitutes an improper attack on a state court judgment." Dkt. No. 22 ¶18; Dkt. No. 29 ¶18. Wiggins also offers a related argument, that THI is not a party to the Admission Contract, in her response to the motion to compel arbitration.⁸ She has not, however, offered any evidence that THI

⁸ Wiggins argues that THI is not the contracting party for the following reasons:

Nowhere in the five-page [Admission Contract] is the plaintiff in this action, THI of South Carolina, LLC mentioned. Plaintiff attempts to [elude] this obvious flaw by claiming it is "doing business as" Magnolia Manor of Columbia, but the plain language of the contract demonstrates the falsity of this argument. The contract lists "Magnolia Manor of Cola, a corporation" (emphasis added) as the contracting party. It makes no reference to an LLC. The corporation Magnolia Manor of Columbia is the defendant in the state court action, and the party to the alleged contract – not an LLC which is not mentioned anywhere in the document.

Dkt. No. 27 at 5.

exists under a different structure than is described in the complaint or that it is affiliated in any way with Magnolia Manor-Columbia, Inc.

In contrast, THI proffers the affidavit of Harry Grunstein who avers that he was the President of IHS Long Term Care, Inc. ("IHS") which was the parent company and sole shareholder of Magnolia Manor-Columbia, Inc. Dkt. No. 34-5 ¶3.⁹ Grunstein also avers that Magnolia Manor-Columbia, Inc., "was the licensed operator of . . . Magnolia Manor-Columbia . . . (the "Facility") until August 30, 2003, after which time the operation and license of the facility was transferred to a new operator, THI of South Carolina at Columbia, LLC ("THI")." *Id.* ¶4 (stating that, after December 31, 2003, Magnolia Manor-Columbia, Inc. "ceased all operations and no longer had an active office for business or any officers, directors or agents"). According to Grunstein, "[w]hile THI has continued to operate the Facility under the trade name "Magnolia Manor-Columbia," a common practice in the industry, Magnolia has had no affiliation with the Facility since the transition on August 30, 2003." *Id.* ¶8. Moreover, "[w]hile the trade name of the Facility is nearly identical to the corporate name of Magnolia Manor-Columbia, Inc., THI and Magnolia Manor-Columbia, Inc. do not share any common members, managers, officers, or shareholders." *Id.* ¶9. Instead, "THI is a separate and distinct corporate entity unaffiliated with IHS or its subsidiary Magnolia Manor-Columbia, Inc.]" *Id.* ¶10.

Wiggins filed a reply in support of her motion for judgment on the pleadings after the above affidavit was proffered. Dkt. No. 36. In that reply, she presents multiple arguments challenging

⁹ This affidavit was apparently first offered in the state court action against Magnolia Manor-Columbia, Inc.

enforcement of the arbitration provision *against Hall* (or his estate) and one argument against enforcement *by THI*. In the latter, she argues that THI is not a party to the Contract (or Arbitration Provision) because the documents do not mention "THI of South Carolina at Columbia, LLC." Dkt. No. 36 at 8. She does not, however, question the authenticity of or otherwise address the Grunstein affidavit. Neither does she seek discovery regarding (1) THI's structure or status as licensee of the facility, Magnolia Manor, or (2) THI's relationship, if any, with the similarly named corporation, Magnolia Manor-Columbia, Inc.

DISCUSSION

THI moves to compel arbitration pursuant to Section 4 of the FAA which states in pertinent part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof

9 U.S.C. § 4.

Wiggins' opposition to arbitration focuses on the second of the four threshold factors: whether there is a written agreement that includes an arbitration provision which purports to cover the dispute.¹⁰ Faced with such a challenge, the court considers whether (1) a valid arbitration

¹⁰ As explained above, the four threshold factors include: "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute." *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir.2005) (internal

agreement exists and (2) whether the dispute falls within the substantive scope of the arbitration agreement. *AT&T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986). If these criteria are met, the district court has "no choice but to grant a motion to compel arbitration." *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002); *see also Hightower v. GMRI, Inc.*, 272 F.3d 239, 242 (4th Cir. 2001).

I. EXISTENCE OF VALID AND ENFORCEABLE ARBITRATION AGREEMENT

Wiggins argues that THI has failed to demonstrate that a valid and enforceable arbitration agreement exists for three reasons. *Id.* First, Wiggins argues that the Arbitration Provision is not binding on her in her capacity as the personal representative of Hall's estate. Second, she argues that THI is not a party to the Contract and, consequently, not entitled to enforce the Arbitration Provision. Third, she argues that the arbitral forum selected by the parties was unavailable at the time the parties executed the Contract. *See* Dkt. Nos. 27 and 36.

Each of these arguments raises issues of contract formation which are resolved under the governing state's law. *See Hill v. PeopleSoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005) (noting that, though the FAA governs whether a dispute is arbitrable, state law controls related issues of contract formation). It is undisputed that South Carolina is the governing state with respect to the Contract (and its Arbitration Provision). Thus, the court applies South Carolina law in addressing Wiggins' three challenges to the validity and enforceability of the Arbitration Provision.

quotation omitted). It is undisputed that THI has met the first and third of the four threshold requirements to compel arbitration as there is a dispute between the parties and the transaction evidenced by the Contract is related to interstate or foreign commerce. The court has also considered the fourth factor *sua sponte* and concluded that there is a sufficient refusal to arbitrate to support entry of a declaratory judgment addressing whether Wiggins is limited to arbitration of her dispute with THI. *See infra* § III.

A. As Personal Representative of Hall's Estate, Wiggins Is Bound by the Contract and its Arbitration Provision

In pursuing this action, Wiggins acts as personal representative of Hall's estate. Under South Carolina law, "a personal representative of a decedent domiciled in this State at his death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as his decedent had immediately prior to death." S.C. Code Ann. § 62-3-703. Thus, Wiggins is bound in her capacity as personal representative if Hall would have been bound immediately prior to his death.

Wiggins argues that THI cannot show a valid written agreement exists between the parties to arbitrate because, even though Wiggins signed the Contract containing the arbitration agreement, "[t]here is nothing in the record to indicate that [Wiggins] had authority to act as agent for [Hall], legally bind [Hall] or waive [Hall]'s right to a jury trial." Dkt. No. 27 at 4. THI responds that Wiggins, as representative of Hall's estate, is required to arbitrate her dispute as Hall was either a third-party beneficiary of the Contract or, alternatively, because he would be estopped from denying that status.

Third-Party Beneficiary Status. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 611 S.E.2d 485, 488 (S.C. 2005); *see also Touchberry v. Florence*, 367 S.E.2d 149, 150 (S.C. 1988) ("[t]he presumption that [a] contract is not enforceable by an individual may be overcome by showing that he was intended to be the direct beneficiary of the contract."). Hall did not sign the Contract; however, he is named as the resident to be admitted to the facility. *Id.* The terms of the

Contract refer to benefits and responsibilities of the resident, the facility, and the fiduciary party.¹¹

Id. Hall's care was the essential purpose of the Contract. Thus, Hall was an intended third-party beneficiary of the Contract which was signed by Wiggins in her capacity as an immediate family member. It follows that Hall was bound by the Arbitration Provision immediately prior to his death and, consequently, that it remains binding on his estate. *See, e.g., Cook v. GGNSC Ripley, LLC*, __ F. Supp. 2d __, No. 3:10CV018, 2011 WL 1439458 (N.D. Miss. Apr. 14, 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under analogous third-party beneficiary law); *Owens v. Coosa Valley Health Care, Inc.*, 890 So.2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. of Clinton v. Estate of Scott*, 19 So.3d 735 (Miss. Ct. App. 2008) (same).¹²

¹¹ Wiggins signed the Contract as "Fiduciary Party" and "Immediate Family Member." *Id.* She does not dispute that her signature binds her personally, but argues that it does not bind her as personal representative of her father's estate for the reasons stated above. Because the court resolves the issue on other grounds, it need not reach the issue of whether the capacity in which Wiggins signed binds the estate.

¹² In her reply, Wiggins argues that Hall cannot be considered a third-party beneficiary because there was no valid contract between herself and Magnolia Manor. Her claim of invalidity rests on her purported lack of capacity to sign the Contract as a "fiduciary." In arguing that she lacks capacity to act as Hall's fiduciary, Wiggins focuses on her lack of authority to "pay" anything out of [Hall's] assets in 2005[,] when she signed the Contract as an "immediate family" member and "fiduciary." *See* Dkt. No. 36 at 2. She argues that any attempt on her part to dispose of Hall's assets to pay for his care would violate public policy rendering the underlying Contract unenforceable. This argument challenges the enforceability of the Contract as a whole and, consequently, is not a matter for resolution by this court. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (in determining that the question of a contract's legality should go to the arbitrator the court held "[f]irst, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance."); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 637 (4th Cir. 2002) ("The law is well settled in this circuit that, if a party seeks to avoid arbitration and/or a stay of federal court proceedings pending the outcome of arbitration by challenging the validity or enforceability of an arbitration provision . . . the grounds must relate specifically to the arbitration clause and not just to the contract as a whole.") (internal quotations omitted).

Equitable Estoppel. Alternatively, Hall's estate is equitably estopped from denying contract formation. It is undisputed that the Contract was signed by an immediate family member of Hall (Wiggins) for the purpose of obtaining residential care for Hall at Magnolia Manor. After execution of the Contract, Hall became a resident of Magnolia Manor and, for an extended period of time, received the benefits provided for in the Contract. Under these circumstances, where the entity operating Magnolia Manor performed in reliance on the terms of the Contract and Hall received the benefit of the Contract, it would be inequitable for Hall's estate (through its personal representative, Wiggins) to avoid the Contract's Arbitration Provision. *See Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417-18 (4th Cir. 2000) (holding that to allow a party to "claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity and contravene the purposes underlying enactment of the [FAA].").¹³

B. THI as Party to Admission Contract

Wiggins' second argument, that THI cannot enforce the Arbitration Provision because it was not a party to the Contract, is equally unavailing. Dkt. No. 27 at 4-5. Wiggins' argument as to THI's ability to enforce the Arbitration Provision rests on the Contract's failure to expressly identify "THI of South Carolina at Columbia, LLC" as a party. THI has, however, presented evidence that it was the registered licensee of Magnolia Manor and the licensee of the facility at the time of Hall's admission in 2005. *See* Grunstein affd. ¶¶ 3-4, 8-10. Wiggins has neither proffered any contrary evidence nor sought discovery as to these or any related issues.

¹³ THI raises several other arguments to support its contention that Wiggins had authority to bind Hall to the arbitration agreement including that Wiggins had statutory authority and apparent authority to do so. However, as the court finds that Hall was bound as third-party beneficiary and under the doctrine of equitable estoppel, the court need not reach these additional arguments.

It follows that, despite the absence of reference to THI in the Contract itself, THI was the only *legal entity* which could have been bound to perform the obligations of the identified facility, Magnolia Manor. It also follows that, because it was the licensee, THI is the entity which actually performed the facility's obligations under the Contract. THI is, therefore, entitled to enforce the Arbitration Provision.¹⁴

C. Arbitral Forum.

Wiggins' third challenge to enforcement rests on an argument that there was no meeting of the minds because the arbitral forum specified in the Arbitration Provision was "unavailable" at the time the Contract was executed. The claim of unavailability has two prongs. First, Wiggins argues that there was no meeting of the minds because the entity referenced in the Arbitration Provision, the National Health Lawyers Association ("NHLA"), no longer existed at the time the Contract was executed. Second, she argues that the rules of the successor entity which did exist in 2005, the American Academy of Health Lawyers Association ("AHLA"), did not allow it to arbitrate claims unless the arbitration agreement was entered after the alleged injury occurred.

Existence of Named Forum. It is undisputed that there was no arbitral forum operating under the NHLA name when the Contract was executed in 2005. According to Wiggins, NHLA ceased to exist due to its merger with another entity which joined to form AHLA. Dkt. No. 27 at 5, n.1. (quoting website as follows "'On July 1, 1997, the National Health Lawyers Association

¹⁴ The Contract expressly refers to "*Magnolia Manor-Cola*, a corporation[.]" (The words shown in italics here were handwritten on the form while the words "a corporation" were preprinted.) *Id.* However, three addenda to the Admission Contract, completed and signed by Wiggins the same day, refer to "*MMOC by THI* a corporation." *Id.* (same use of italics). Thus, although THI is not mentioned in the Contract itself, incorporated documents signed the same day reveal THI's relationship to Magnolia Manor.

(NHLA) and the American Academy of Healthcare Attorneys (AAHA) combined into a single organization, creating the nation's largest educational organization devoted to legal issues in the health industry.' (<http://www.healthlawyers.org/About/Pages/default.aspx>, accessed June 30, 2011)."); *see also* Dkt. No. 36 at 8-9 (Wiggins' reply in support of motion for judgment on the pleadings). THI responds by characterizing the change as one in name only, but does not challenge Wiggins' characterization of how the name change came about. Dkt. No. 34 at 13-14.

Under South Carolina law, for a valid and enforceable contract "there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract." *Player v. Chandler*, 382 S.E.2d 891 (1989). "Where designation of a specific arbitral forum *has implications that may substantially affect the substantive outcome of the resolution*," it is an integral term of the arbitration agreement. *See Grant v. Magnolia Manor-Greenwood, Inc.*, 678 S.E.2d 435, 438-39 (S.C. 2009) (holding that specific designation of a particular arbitrator was an integral term) (emphasis added).

Based on *Grant*, Wiggins argues that because the chosen arbitral forum no longer existed when the Contract was signed (1) an integral term of the agreement was impossible to perform and (2) there was no meeting of the minds, thus rendering the arbitration agreement invalid and unenforceable. Dkt. No. 36 at 9. The court disagrees. Accepting Wiggins' characterization of events, NHLA ceased to exist under that name due to its merger with another entity and adoption of a new name by the combined entity. This is not, alone, a change which would "substantially affect the substantive outcome" of the dispute or procedures to be applied assuming the parties

continued to have access to the forum available under the combined name.¹⁵ Therefore, given the Supreme Court's encouragement of a "healthy regard for the federal policy favoring arbitration" (*Levin*, 634 F.3d at 267), the court finds that the merger of NHLA with another entity and adoption of a new (combined) name did not, alone, prevent a meeting of the minds which rendered the arbitration agreement invalid.

AHLA's Availability to Administer Pre-Injury Arbitration Agreements. The more critical question is whether limitations on the scope of disputes arbitrated by the AHLA in 2005 precluded coverage of the present dispute and, consequently, prevented a meeting of the minds to arbitrate disputes such as this one. On this issue, Wiggins notes that, in 2005, the AHLA would only arbitrate claims pursuant to arbitration agreements entered into *after* an alleged injury occurred. *Id.* Because the present dispute relates to a post-agreement injury, Wiggins argues that it would not have been allowed under the then-applicable rules, precluding a meeting of the minds as to what claims would be subject to arbitration.

In making this argument, Wiggins relies on the South Carolina Supreme Court's holding in *Grant v. Magnolia Manor-Greenwood, Inc.* 678 S.E.2d 435 (S.C. 2009). There the court held that an arbitration provision became unenforceable when the forum specified in the provision modified

¹⁵ In *Grant*, the court noted this very same name change in a footnote without suggesting that it raised any concern as to enforceability of the contract. *See Grant*, 678 S.E.2d at 437, n.1 ("The NHLA has since become the American Health Lawyers Association (the 'AHLA') and hereinafter will be referred to by that name."). This is of particular note as the name change at issue occurred prior to execution of the contract at issue in *Grant* which, like the Contract here, referred to the NHLA. Thus, the circumstances in *Grant* were similar to those presented in this case as it relates to the designation of the specified forum.

its rules to preclude arbitration of claims for injuries which post-dated the arbitration agreement.¹⁶

THI argues that this case is distinguishable from *Grant* because while the AHLA was unavailable to hear the parties' dispute in *Grant*, the AHLA is currently able to hear Wiggins' dispute. This availability is the result of a recent rule change which allows for arbitration of disputes regarding injuries which occurred after the arbitration agreement has been executed. See Am. Health Lawyers Ass'n Alternative Dispute Resolution Serv., *Rules of Procedure for Arbitration* 1.01 at A-6 (July 2010).

The court agrees that *Grant* is not controlling in light of this distinction. This leaves the question of whether the potential conflict between the breadth of the Arbitration Provision and narrowness of what was arbitrable under AHLA rules at the time the Contract was executed prevented a meeting of the minds. The court finds that it does not for two reasons. First, no evidence has been presented that Wiggins, Hall or anyone else acting on Hall's behalf was even aware of the potential conflict, much less that any party relied on it. Thus, the only evidence of what the parties actually intended is the plain language of the Arbitration Provision. Even if the parties were aware of the rules of the forum, they would have been aware that rule changes were possible

¹⁶ The parties in *Grant* executed their arbitration agreement in 2003. *Id.* at 436. In 2004, the AHLA amended its rules to state that it would no longer administer arbitrations pursuant to pre-injury arbitration agreements. *Id.* at 437. Plaintiff suffered injury in 2005. At the time defendant moved to compel arbitration, the 2004 rules were still in force. *Id.* Therefore, despite the arbitration agreement's specification of the AHLA as arbitral forum, the AHLA was unavailable to arbitrate the parties' dispute. *Id.* On these facts, the South Carolina Supreme Court held that the arbitration agreement could not be enforced (including by substitution of an alternative forum) because (1) the parties' choice of arbitral forum was an integral term of the agreement and (2) the arbitral forum was unavailable at the time of the dispute. *Id.* at 439.

and that the rules in effect at the time arbitration was invoked would control.¹⁷ Under these circumstances, the court finds no evidence to support Wiggins' claim that there was no meeting of the minds.

For the reasons set forth above, the court concludes that the arbitration agreement was valid and enforceable as between THI and Wiggins as personal representative of Hall's estate.¹⁸

II. ARBITRABILITY OF DISPUTE

Wiggins argues that any dispute between the parties is not arbitrable because the FAA does not give arbitrators authority to either enforce or vacate judgments of the courts of South Carolina. Dkt. 27 at 8. However, as THI argues, the goal of arbitration in this case is not to thwart enforcement or vacate a judgment, as Wiggins does not have a judgment against THI. *See* Dkt. No. 34 at 16. Rather, THI seeks to compel arbitration of Wiggins' claim that THI should be held responsible for the default judgment Wiggins obtained against Magnolia Manor-Columbia, Inc. The arbitration agreement entered into between the parties requires that any action, dispute, claim or controversy arising out of Hall's care must be resolved in an arbitration proceeding. *See* Dkt. No.

¹⁷ At the time the parties executed the Admission Contract the AHLA rules included a provision stating:

These rules may be amended or interpreted by the by the [AHLA] from time to time which amendments or interpretations thereafter become binding upon the parties to an arbitration pursuant to these Rules or under the auspices of the [AHLA]. Any reference to these Rules shall be construed to refer to these Rules as amended and interpreted from time to time.

Dkt. No. 34-3 at 20 (*AHLA Rules of Procedure for Arbitration* in force in May 2005).

¹⁸ Had Wiggins raised a genuine issue of material fact as to the existence of the arbitration agreement, the FAA would require the court to "proceed summarily" to jury trial on that issue. 9 U.S.C. § 4.

1-1. A determination of whether THI could be held responsible for the default judgment entered against another party will necessarily require determination of several factual and legal issues related to Hall's stay at Magnolia Manor. Therefore, Wiggins' claim that THI should be held responsible for the default judgment falls within the scope of the arbitration agreement:

III. NATURE OF RELIEF

The specific relief sought by THI is an order compelling Wiggins to arbitrate her dispute. *See* Dkt. No. 34 at 20. However, Wiggins has not yet instituted a legal action directly against THI nor taken legal action to impose liability on THI, although she has threatened and expressed her intention to seek to amend her default judgment against Magnolia Manor-Columbia, Inc. to include THI. *See, e.g.*, Dkt. No. 27 at 8 (expressing an intent to "seek to have [the state court judgment] amended to include [THI]"). Under these circumstances, the court finds the relief sought by THI is in the nature of a request for declaratory relief.¹⁹ Therefore, the court grants THI's motion insofar as it seeks a declaratory judgment that the arbitration agreement is binding. The court also permanently enjoins Wiggins from prosecuting her dispute with THI in anything other than an arbitral forum as provided in the Arbitration Provision.

CONCLUSION

For the reasons set forth above, the court grants THI's motion to compel arbitration to the extent it seeks a declaratory judgment that the arbitration agreement is binding and permanently enjoins Wiggins from prosecuting her dispute with THI in anything other than an arbitral forum

¹⁹ This determination considers the fourth threshold requirement for entry of an order compelling arbitration: the failure, neglect or refusal to arbitrate. Even though Wiggins has evidenced her refusal to arbitrate, there is no current action which the court can compel be sent to arbitration.

pursuant to the Admission Contract. Thus, Wiggins' motion for judgment on the pleadings is rendered moot.

IT IS SO ORDERED.

s/ Cameron McGowan Currie
CAMERON MCGOWAN CURRIE
UNITED STATES DISTRICT JUDGE

Columbia, South Carolina
September 13, 2011

EXHIBIT C

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Ora Harris, Ethel D. Greene, and Alexander
Goodwin, as Co-Personal Representatives of
The Estate of Leuvenia W. Looney, deceased,

Plaintiffs,

vs.

UHS-Pruitt Holdings, Inc., Pruitt
Properties, Inc., United Health Services of
South Carolina, Inc., Carolina Healthcare
Properties, Inc., Unihealth Post-Acute
Care - Columbia, LLC, ABC Company
d/b/a Central Carolina Health &
Rehabilitation Center, and ABC
Corporation d/b/a Carolina Health and
Rehab, Inc.

Defendants.

IN THE COURT OF COMMON PLEAS
OF THE FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2009-CP-40-000891

ORDER GRANTING MOTION
TO COMPEL ARBITRATION

JEANETTE W. McBRIDE
C.C.P. & G.S.

2009 DEC 23 PM 12:08

RICHLAND COUNTY
FILED

This matter came before the Court for hearing on Friday, September 25, 2009, on Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings and Defendants' brief in support of their Motion to Compel Arbitration, both filed May 15, 2009. The issue raised in the Motion to Compel Arbitration is whether the Plaintiffs should be compelled to bring their claims against the Defendants in an arbitration proceeding in accordance with an arbitration agreement covering Plaintiffs' claims. On the day of the hearing, Plaintiffs filed a brief in opposition to Defendants' Motion to Compel Arbitration. Defendants filed a brief in reply to Plaintiffs' Opposition the same day. After reviewing all of the pleadings, exhibits, and relevant case law, and hearing arguments from counsel for all parties, for the reasons set forth below, the Court finds that the Defendants' Motion to Compel Arbitration should be GRANTED.

Facts

Leuvenia W. Looney ("Ms. Looney") was admitted to Carolina Health, a skilled nursing facility operated by Defendant UniHealth Post-Acute Care - Columbia, LLC ("UniHealth"), located in Columbia, South Carolina, on March 21, 2006 by her son Alexander Goodwin ("Mr. Goodwin"), a Plaintiff in this action. In order to admit Ms. Looney to Carolina Health, Mr. Goodwin contracted with Carolina Health on behalf of Ms. Looney. Among the contracts Mr. Goodwin entered into on behalf of Ms. Looney in order to procure her admission to Carolina Health was the Arbitration Agreement, which is attached as Exhibit A to Defendants' Memorandum in Support of their Motion to Compel Arbitration. UniHealth admitted Ms. Looney to Carolina Health, and Ms. Looney remained a resident of Carolina Health from March 21, 2006 until February 7, 2007 based on these contracts. During this time, Ms. Looney accepted the benefits of the contract procured for her by Mr. Goodwin. While Ms. Looney was a resident of Carolina Health, neither she nor anyone on her behalf repudiated any portion of the agreements executed by Mr. Goodwin, including the Arbitration Agreement, or in any way questioned his authority to admit Ms. Looney to Carolina Health.

The Arbitration Agreement provides that "any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or relating to the Resident's Admission Agreement with the Facility (the 'Admission Agreement') or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration." (Arbitration Agreement, p.1 (emphasis in original)). The Arbitration Agreement expressly states "that the parties are waiving their right to a trial before a jury or a judge." The Arbitration Agreement encompasses all claims alleging "violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of

medical or health care or safety whether sounding in tort or in contract." The Arbitration Agreement expresses the parties' intent that it "shall benefit and be binding upon the parties, their successors and assigns, including the agents employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including . . . any . . . child . . . , executor, administrator, legal representative, or heir of the Resident."

Plaintiffs filed their Complaint in this action on February 11, 2009, alleging a statutory wrongful death action pursuant to South Carolina Code § 15-51-10 and a statutory survival action pursuant to South Carolina Code § 15-5-90. Plaintiff alleges that "[u]pon information and belief, Defendants UHS Holdings, Pruitt, United Health, Carolina Properties and UniHealth have collectively been doing business as Central Carolina Health and Rehabilitation Center." Plaintiff alleges that two fictitious entities are "licensed and doing business as nursing home, Central Carolina Health and Rehabilitation Center" and "Carolina Health and Rehab, Inc." The allegations in Plaintiffs' Complaint all arise out of Ms. Looney's admission to Carolina Health and the duties allegedly undertaken by Defendants in connection with this admission.

Analysis

1. Law Governing Arbitration.

Defendants have argued that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (hereinafter, the "FAA") governs the Arbitration Agreement. Plaintiffs do not dispute this contention. Plaintiffs have sued South Carolina entities and Georgia corporations, thus establishing the requisite interstate nexus for application of the FAA on the very face of the Complaint. Additionally, the nursing home industry, of which Carolina Health is a part, satisfies the applicable test for a finding of the requisite nexus to interstate commerce. Therefore, I find that the Arbitration Agreement is governed by the FAA.



In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate,'" Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Moses H. Cone Memorial Hosp. v. Mercury Const. Corp., 460 U.S. 1, 24 (1983)). The purpose of the FAA "was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." Booth v. Hume Publishing, Inc., 902 F.2d 925, 932 (11th Cir. 1990) (citing O.R. Securities v. Professional Planning Assocs., 857 F.2d 742, 745-46 (11th Cir. 1988)); accord Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunities for review in the courtroom for the simplicity, informality, and expedition of arbitration.'"); Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (recognizing that one of the primary reasons parties choose arbitration is to avoid the expense and delay often associated with litigation). Congress' intention in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements and to place arbitration agreements upon the same footing as other contracts." Green Tree Financial Corp.-Ala. v. Randolph, 121 S. Ct. 513, 521 (2000) (quoting Gilmer, 500 U.S. at 33).

The language of the FAA is not permissive, but instead mandates enforcement of arbitration agreements. Section 4 of the FAA provides in pertinent part as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean



Wittier Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added).

The only two inquiries relevant to the enforcement of an arbitration agreement under the FAA are (1) the existence of a valid arbitration agreement; and (2) whether the dispute is within the scope of the arbitration agreement. If both of these questions are answered in the affirmative, "the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. (emphasis added). In resolving this inquiry, the arbitration agreement at issue must be treated as any other contract and not subjected to greater scrutiny because it is an arbitration agreement. Indeed, any doubts regarding arbitrability must be resolved in favor of arbitration. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686 (1995); Allied-Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Ferro Corp. v. Garrison Industries, Inc., 142 F.3d 926, 932 (6th Cir. 1998).

2. Existence of a Valid Arbitration Agreement.

Plaintiffs have raised an issue as to only the first of the two threshold issues – the existence of a valid arbitration agreement. Plaintiffs argue that Mr. Goodwin did not have authority to execute the Arbitration Agreement on behalf of Ms. Looney. Plaintiffs further argue that even if Mr. Goodwin was authorized to execute the Arbitration Agreement on behalf of Ms. Looney, the Arbitration Agreement cannot bind the Plaintiffs. Plaintiffs further argue that the Defendants other than UniHealth are not parties to the Arbitration Agreement and, therefore, cannot claim the benefits of the Arbitration Agreement. Plaintiffs further argue that the Arbitration Agreement cannot be performed based on a policy of the American Arbitration Association ("AAA").

Plaintiffs have not disputed the second issue – that the claims asserted in the Complaint are within the scope of the broad terms of the Arbitration Agreement.

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A. *The Arbitration Agreement is Valid and Enforceable.*

At the outset, I note that the validity of the Arbitration Agreement must be determined in accordance with the general principles of contract law in South Carolina that would apply to any other contract. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In accordance with South Carolina's law of contracts, I find that Mr. Goodwin had authority to enter the Arbitration Agreement. Ms. Looney allowed Mr. Goodwin to procure her admission to Carolina Health on her behalf. By allowing Mr. Goodwin to procure her admission to Carolina Health and accepting the benefits of the contracts entered into in connection with that admission, Ms. Looney implicitly represented that Mr. Goodwin was authorized to act on her behalf in connection with her admission to Carolina Health. R & G Construction, Inc. v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 433, 540 S.E.2d 113 ("When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.")

Additionally, Ms. Looney accepted the benefits of these contracts with Carolina Health. Neither Ms. Looney, nor anyone acting on her behalf, repudiated any of the agreements executed by Mr. Goodwin in order to admit Ms. Looney to Carolina Health. By becoming a resident of Carolina Health and accepting the benefits of this residency, Ms. Looney ratified the contracts entered on her behalf in connection with her admission to Carolina Health (including the Arbitration Agreement). Ms. Looney cannot ratify that part of the contract under which she has accepted the benefits and avoid that part which she later deems (through Plaintiffs) to be disadvantageous. Southern Bell Telephone & Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 59 S.E.2d 146 (1950).

Having allowed Mr. Goodwin to contract on her behalf and having ratified those contracts by accepting the benefits, Ms. Looney cannot now, through Plaintiffs, repudiate the portions of those contracts (i.e., the Arbitration Agreement) which Plaintiffs no longer deem advantageous.

B. Plaintiffs Are Bound by the Arbitration Agreement.

I further find that Plaintiffs are bound by the Arbitration Agreement as to the claims asserted in the Complaint because their claims are derivative of Ms. Looney's claims and arise out of the care rendered to Ms. Looney pursuant to the contracts pursuant to which Ms. Looney was admitted to Carolina Health. The Arbitration Agreement unambiguously covers Plaintiffs' claims. The duties owed to Ms. Looney arise out of her admission to Carolina Health, which is based on the contractual relationship between Carolina Health and Ms. Looney. Accordingly, Plaintiffs cannot avoid the Arbitration Agreement which is a part of the admission contracts under which the Defendants' alleged duties arise. Because Plaintiffs' claims arise out of Ms. Looney's admission to Carolina Health and are derivative of any claims Ms. Looney could have asserted against Carolina Health, they are clearly covered by the Arbitration Agreement, and Plaintiffs are bound to arbitrate these claims.

C. Defendants Are Entitled to Arbitrate the Claims Against Them.

Additionally, I find that Defendants are entitled to arbitrate the claims pursuant to the Arbitration Agreement. The allegations against all of the Defendants relate to Ms. Looney's admission to Carolina Health. The Complaint does not allege any undertaking of any duty by any of the Defendants other than the admission to Carolina Health. The Complaint does not differentiate between any of the Defendants in terms of their responsibilities for Ms. Looney's

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care. Instead, the Complaint lumps the Defendants together as a collective enterprise "doing business as [Carolina Health]." The Arbitration Agreement, by its express terms, covers Plaintiffs' claims against the Defendants. Additionally, if the Court were to allow Plaintiffs to pursue their claims against Carolina Health in litigation by alleging that affiliates of the operating entity (UniHealth) are also responsible for the care provided at Carolina Health, this would frustrate the express intent of the Arbitration Agreement to have all claims relating to care provided by Carolina Health resolved exclusively by binding arbitration. Accordingly, Defendants are entitled to enforce the Arbitration Agreement.

D. The AAA Healthcare Policy Statement Does Not Invalidate the Arbitration Agreement.

Plaintiffs claim that the Arbitration Agreement requires the AAA to administer any arbitration between the parties and that a policy adopted by the AAA precludes arbitration of the parties' dispute. I find that the Arbitration Agreement does not require the arbitration to be administered by the AAA, and the AAA's Healthcare Policy Statement has no impact on the parties' obligations under the Arbitration Agreement.

Plaintiffs' claim that the Arbitration Agreement requires arbitration solely before the AAA is contrary to the plain language of the Arbitration Agreement. As indicated in the recent case of Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009), arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism, 325 S.C. 97, 403, 480 S.E.2d 81, 84 (1997). "Where a contract is

unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983).

Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.

C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988) (internal citations omitted).

The Arbitration Agreement requires all disputes regarding care provided to Ms. Looney by Carolina Health to "be settled exclusively by binding arbitration." (Arbitration Agreement (emphasis in original)). The Arbitration Agreement further declares the parties' intention to resolve any dispute solely by arbitration by stating: "This means that the parties are waiving their right to a trial before a jury or a judge." This language is clear and unambiguous. The Arbitration Agreement in the present case provides that "[a]ny arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ('AAA') and any resulting decision shall be enforceable by a court of competent jurisdiction." The Arbitration Agreement does not require that any arbitration be *administered* by the AAA. Therefore, the Arbitration Agreement, by its express terms, can be enforced without any involvement of the AAA.

I also note that the AAA's Healthcare Policy Statement does not preclude arbitration of

the parties' dispute. The AAA's "Healthcare Policy Statement" states that "[a]s a result of its review of its caseload in the healthcare arena . . . it will no longer accept the administration of cases involving individual patients *without a post-dispute agreement to arbitrate*." The AAA is not a party to the Arbitration Agreement, and Congress has not authorized the AAA to override the policy favoring arbitration expressed in the FAA. Accordingly, the AAA is not empowered to invalidate the Arbitration Agreement. Moreover, a close review of the language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its forum for all healthcare disputes in general or Plaintiffs' dispute in particular. Nor has the AAA determined that it is unable to administer such disputes effectively. Instead, the AAA's policy is based solely on "its review of its caseload in the healthcare arena." And the AAA's position is limited to "cases involving individual patients without a post-dispute agreement to arbitrate." The AAA can and will administer Plaintiffs' claims with nothing more than a signed submission agreement. Plaintiffs cannot avoid their obligation to arbitrate by creating an artificial obstacle to performance of their obligation. See, e.g., Tate v. Lemaster, 231 S.C. 429, 440, 99 S.E.2d 39, 45 (1957) (recognizing "general rule that a party to a contract cannot avoid liability upon the ground that the other party has not fulfilled a condition precedent to such liability when he himself has prevented such fulfillment"); Huffines Co. v. Lockhart, 365 S.C. 178, 195, 617 S.E.2d 125, 134 (Ct. App. 2005) (a party may not claim the protection of a condition precedent which he prevents from occurring); see also Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970) (There exists in every contract an implied covenant of good faith and fair dealing). Therefore, the AAA Healthcare Policy Statement would not preclude arbitration even if the Arbitration Agreement did require AAA administration.

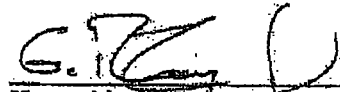
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Conclusion

Based on the above facts and law, the Court will enforce the Arbitration Agreement in accordance with Section 4 of the FAA (9 U.S.C. § 4). Plaintiffs shall assert their claims against the Defendants in arbitration pursuant to the Arbitration Agreement. This matter shall be stayed pending completion of the arbitration pursuant to Section 3 of the FAA (9 U.S.C. § 3).

IT IS SO ORDERED.


Honorable G. Thomas Cooper, Jr.
Resident Judge Fifth Judicial Circuit

December 21, 2009
Columbia, South Carolina

EXHIBIT D

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

OF THE FIFTH JUDICIAL CIRCUIT

Henry Archie, as Personal Representative
of the Estate of James H. Archie, deceased,

Plaintiff,

v.

UHS-Pruitt Holdings, Inc., Pruitt
Properties, Inc., United Health Services of
South Carolina, Inc., Carolina Healthcare
Properties, Inc., Unihealth Post-Acute
Care - Columbia, LLC, ABC Company
d/b/a Central Carolina Health &
Rehabilitation Center, and ABC
Corporation d/b/a Carolina Health and
Rehab, Inc.

Defendants.

CIVIL ACTION NO. 2009-CP-40-000892.

**ORDER GRANTING MOTION
TO COMPEL ARBITRATION**

JEANETTE W. McBRIDE
C.C.P. & C.S.

2009 DEC 23 PM 12:08

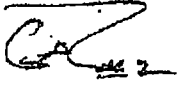
RICHLAND COUNTY
FILED

This matter came before the Court for hearing on Friday, September 25, 2009, on Defendants' Motion to Dismiss and Compel Arbitration or, Alternatively, to Compel Arbitration and Stay Proceedings and Defendants' brief in support of their Motion to Compel Arbitration, both filed May 15, 2009. The issue raised in the Motion to Compel Arbitration is whether the Plaintiff should be compelled to bring his claims against the Defendants in an arbitration proceeding in accordance with an arbitration agreement covering Plaintiff's claims. On the day of the hearing, Plaintiff filed a brief in opposition to Defendants' Motion to Compel Arbitration. Defendants filed a brief in reply to Plaintiff's Opposition the same day. After reviewing all of the pleadings, exhibits, and relevant case law, and hearing arguments from counsel for all parties, for the reasons set forth below, the Court finds that the Defendants' Motion to Compel Arbitration should be GRANTED.

Facts

James H. Archie ("Mr. Archie") was admitted to Carolina Health, a skilled nursing facility operated by Defendant UniHealth Post-Acute Care - Columbia, LLC ("UniHealth"), located in Columbia, South Carolina, on December 7, 2005 by his daughter and personal representative Gloria Archie ("Ms. Archie"). In order to admit Mr. Archie to Carolina Health, Ms. Archie contracted with Carolina Health on behalf of Mr. Archie. Among the contracts Ms. Archie entered into on behalf of Mr. Archie in order to procure his admission to Carolina Health was the Arbitration Agreement, which is attached as Exhibit A to Defendants' Memorandum in Support of their Motion to Compel Arbitration. UniHealth admitted Mr. Archie to Carolina Health, and Mr. Archie remained a resident of Carolina Health from December 7, 2005 until March 2, 2006 based on these contracts. During this time, Mr. Archie accepted the benefits of the contract procured for him by Ms. Archie. While Mr. Archie was a resident of Carolina Health, neither he nor anyone on his behalf repudiated any portion of the agreements executed by Ms. Archie, including the Arbitration Agreement, or in any way questioned her authority to admit Mr. Archie to Carolina Health.

The Arbitration Agreement provides that "any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or relating to the Resident's Admission Agreement with the Facility (the 'Admission Agreement') or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration." (Arbitration Agreement, p.1 (emphasis in original)). The Arbitration Agreement expressly states "that the parties are waiving their right to a trial before a jury or a judge." The Arbitration Agreement encompasses all claims alleging "violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of



medical or health care or safety whether sounding in tort or in contract." The Arbitration Agreement expresses the parties' intent that it "shall benefit and be binding upon the parties, their successors and assigns, including the agents employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including . . . any . . . child . . . , executor, administrator, legal representative, or heir of the Resident."

Plaintiff filed his Complaint in this action on February 11, 2009, alleging a statutory wrongful death action pursuant to South Carolina Code § 15-51-10 and a statutory survival action pursuant to South Carolina Code § 15-5-90. Plaintiff alleges that "[u]pon information and belief, Defendants UHS Holdings, Pruitt, United Health, Carolina Properties and UniHealth have collectively been doing business as Central Carolina Health and Rehabilitation Center." Plaintiff alleges that two fictitious entities are "licensed and doing business as nursing home, Central Carolina Health and Rehabilitation Center" and "Carolina Health and Rehab, Inc." Plaintiff alleges that "[a]t times pertinent hereto, Central Carolina Health & Rehab Center was responsible for rendering care to the Plaintiff's decedent." The allegations in Plaintiff's Complaint all arise out of Mr. Archie's admission to Carolina Health and the duties allegedly undertaken by Defendants in connection with this admission.

Plaintiff's Complaint

Legal Analysis

1. Law Governing Arbitration

Defendants have argued that the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (hereinafter, the "FAA") governs the Arbitration Agreement. Plaintiff does not dispute this contention. Plaintiff has sued South Carolina entities and Georgia corporations, thus establishing the requisite interstate nexus for application of the FAA on the very face of the Complaint. Additionally, the nursing home industry, of which Carolina Health is a part, satisfies the

applicable test for a finding of the requisite nexus to interstate commerce. Therefore, I find that the Arbitration Agreement is governed by the FAA.

In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, "requiring that [courts] 'rigorously enforce agreements to arbitrate.'" Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). The purpose of the FAA "was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation." Booth v. Hume Publishing, Inc., 902 F.2d 925, 932 (3d Cir. 1990) (citing O.R. Securities v. Professional Planning Assocs., 857 F.2d 742, 745-46 (11th Cir. 1988)); accord Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991) ("by agreeing to arbitrate, a party 'trades the procedures and opportunities for review in the courtroom for the simplicity, informality, and expedition of arbitration.'"); Southland Corp. v. Keating, 465 U.S. 1, 7 (1984) (recognizing that one of the primary reasons parties choose arbitration is to avoid the expense and delay often associated with litigation). Congress' intention in enacting the FAA was "to reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements upon the same footing as other contracts." Green Tree Financial Corp. v. Randolph, 121 S. Ct. 513, 521 (2000) (quoting Gilmer, 500 U.S. at 33).

The language of the FAA is not permissive, but instead mandates enforcement of arbitration agreements. Section 4 of the FAA provides in pertinent part as follows:

The court shall hear the parties and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (emphasis added). "By its terms, the act leaves no place for the exercise of

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discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 218 (1985) (emphasis added).

The only two inquiries relevant to the enforcement of an arbitration agreement under the FAA are (1) the existence of a valid arbitration agreement; and (2) whether the dispute is within the scope of the arbitration agreement. If both of these questions are answered in the affirmative, "the court *shall* make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4 (emphasis added). In resolving this inquiry, the arbitration agreement at issue must be treated as any other contract and not subjected to greater scrutiny because it is an arbitration agreement. Indeed, any doubts regarding arbitrability must be resolved in favor of arbitration. See Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 686 (1995); Allied Bruce Terminix Companies, Inc. v. Dobson, 513 U.S. 265 (1995); Ferro Corp. v. Garrison Industries, Inc., 142 F.3d 926, 932 (6th Cir. 1998).

2. Existence of a Valid Arbitration Agreement

Plaintiff has raised an issue as to only the first of the two threshold issues—the existence of a valid arbitration agreement. Plaintiff argues that Ms. Archie did not have authority to execute the Arbitration Agreement on behalf of Mr. Archie. Plaintiff further argues that even if Ms. Archie was authorized to execute the Arbitration Agreement on behalf of Mr. Archie, the Arbitration Agreement cannot bind the Plaintiff. Plaintiff further argues that the Defendants other than UniHealth are not parties to the Arbitration Agreement and, therefore, cannot claim the benefits of the Arbitration Agreement. Plaintiff further argues that the Arbitration Agreement cannot be performed based on a policy of the American Arbitration Association ("AAA").

Plaintiff has not disputed the second issue - that the claims asserted in the Complaint are within the scope of the broad terms of the Arbitration Agreement.

A. *The Arbitration Agreement is Valid and Enforceable.*

At the outset, I note that the validity of the Arbitration Agreement must be determined in accordance with the general principles of contract law in South Carolina that would apply to any other contract. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In accordance with South Carolina's law of contracts, I find that Ms. Archie had authority to enter the Arbitration Agreement. Mr. Archie allowed Ms. Archie to procure his admission to Carolina Health on his behalf. By allowing Ms. Archie to procure his admission to Carolina Health and accepting the benefits of the contracts entered into in connection with that admission, Mr. Archie implicitly represented that Ms. Archie was authorized to act on his behalf in connection with his admission to Carolina Health. R. & G Construction, Inc., v. Lowcountry Regional Transportation Authority, 343 S.C. 424, 433, 540 S.E.2d 113 ("When a principal, by any such acts or conduct, has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he will be estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.")

Additionally, Mr. Archie accepted the benefits of these contracts with Carolina Health. Neither Mr. Archie, nor anyone acting on his behalf, repudiated any of the agreements executed by Ms. Archie in order to admit Mr. Archie to Carolina Health. By becoming a resident of Carolina Health and accepting the benefits of this residency, Mr. Archie ratified the contracts entered on his behalf in connection with his admission to Carolina Health (including the Arbitration Agreement). Mr. Archie cannot ratify that part of the contract under which he has

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accepted the benefits and avoid that part which he later deems (through Plaintiff) to be disadvantageous. Southern Bell Telephone & Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 59 S.E.2d 146 (1950).

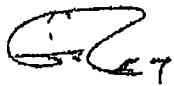
Having allowed Ms. Archie to contract on his behalf and having ratified those contracts by accepting their benefits, Mr. Archie cannot now, through Plaintiff, repudiate the portions of those contracts (i.e., the Arbitration Agreement) which Plaintiff no longer deems advantageous.

B. Plaintiff is Bound by the Arbitration Agreement.

I further find that Plaintiff is bound by the Arbitration Agreement as to the claims asserted in the Complaint because his claims are derivative of Mr. Archie's claims and arise out of the care rendered to Mr. Archie pursuant to the contracts pursuant to which Mr. Archie was admitted to Carolina Health. The Arbitration Agreement unambiguously covers Plaintiff's claims. The duties owed to Mr. Archie arise out of his admission to Carolina Health, which is based on the contractual relationship between Carolina Health and Mr. Archie. Accordingly, Plaintiff cannot avoid the Arbitration Agreement which is a part of the admission contracts under which the Defendants' alleged duties arise. Because Plaintiff's claims arise out of Mr. Archie's admission to Carolina Health and are derivative of any claims Mr. Archie could have asserted against Carolina Health, they are clearly covered by the Arbitration Agreement, and Plaintiff is bound to arbitrate these claims.

C. Defendants Are Entitled to Arbitrate the Claims Against Them.

Additionally, I find that Defendants are entitled to arbitrate the claims pursuant to the Arbitration Agreement. The allegations against all of the Defendants relate to Mr. Archie's admission to Carolina Health. The Complaint does not allege any undertaking of any duty by



any of the Defendants other than the admission to Carolina Health. The Complaint does not differentiate between any of the Defendants in terms of their responsibilities for Mr. Archie's care. Instead, the Complaint lumps the Defendants together as a collective enterprise "doing business as [Carolina Health]." The Arbitration Agreement, by its express terms, covers Plaintiff's claims against the Defendants. Additionally, if the Court were to allow Plaintiff to pursue his claims against Carolina Health in litigation by alleging that affiliates of the operating entity (UniHealth) are also responsible for the care provided at Carolina Health, this would frustrate the express intent of the Arbitration Agreement to have all claims relating to care provided by Carolina Health resolved exclusively by binding arbitration. Accordingly, Defendants are entitled to enforce the Arbitration Agreement.

D. *The AAA Healthcare Policy Statement Does Not Invalidate the Arbitration Agreement*

Plaintiff claims that the Arbitration Agreement requires the AAA to administer any arbitration between the parties and that a policy adopted by the AAA precludes arbitration of the parties' dispute. I find that the Arbitration Agreement does not require the arbitration to be administered by the AAA, and the AAA's Healthcare Policy Statement has no impact on the parties' obligations under the Arbitration Agreement.

Plaintiff's claim that the Arbitration Agreement requires arbitration solely before the AAA is contrary to the plain language of the Arbitration Agreement. As indicated in the recent case of Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 678 S.E.2d 435 (2009), arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial

construction, the terms of an unambiguous contract." Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." Warner v. Weader, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983).

Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the parties. When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible.

C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission, 296 S.C. 373, 377-78, 373 S.E.2d 584, 585 (1988) (internal citations omitted).

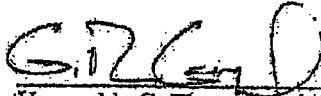
The Arbitration Agreement requires all disputes regarding care provided to Mr. Archie by Carolina Health to "be settled exclusively by binding arbitration." (Arbitration Agreement (emphasis in original)). The Arbitration Agreement further declares the parties' intention to resolve any dispute solely by arbitration by stating: "This means that the parties are waiving their right to a trial before a jury or a judge." This language is clear and unambiguous. The Arbitration Agreement in the present case provides that "[a]ny arbitration proceeding that takes place under this Arbitration Agreement, shall follow the rules of the American Arbitration Association ('AAA') and any resulting decision shall be enforceable by a court of competent jurisdiction." The Arbitration Agreement does not require that any arbitration be administered by the AAA. Therefore, the Arbitration Agreement, by its express terms, can be enforced without any involvement of the AAA.

I also note that the AAA's Healthcare Policy Statement does not preclude arbitration of the parties' dispute. The AAA's "Healthcare Policy Statement" states that "[a]s a result of its review of its caseload in the healthcare arena . . . it will no longer accept the administration of cases involving individual patients *without a post-dispute agreement to arbitrate*." The AAA is not a party to the Arbitration Agreement, and Congress has not authorized the AAA to override the policy favoring arbitration expressed in the FAA. Accordingly, the AAA is not empowered to invalidate the Arbitration Agreement. Moreover, a close review of the language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its forum for all healthcare disputes in general or Plaintiff's dispute in particular. Nor has the AAA determined that it is unable to administer such disputes effectively. Instead, the AAA's policy is based solely on "its review of its caseload in the healthcare arena." And the AAA's position is limited to "cases involving individual patients without a post-dispute agreement to arbitrate." The AAA can and will administer Plaintiff's claims with nothing more than a signed submission agreement. Plaintiff cannot avoid his obligation to arbitrate by creating an artificial obstacle to performance of his obligation. See, e.g., Tate v. Lemaster, 231 S.C. 429, 440, 99 S.E.2d 39, 45 (1957) (recognizing "general rule that a party to a contract cannot avoid liability upon the ground that the other party has not fulfilled a condition precedent to such liability when he himself has prevented such fulfillment"); Huffines Co. v. Lookhart, 365 S.C. 178, 195, 617 S.E.2d 125, 134 (Ct. App. 2005) (a party may not claim the protection of a condition precedent which he prevents from occurring); see also Tharpe v. G.E. Moore Co., 254 S.C. 196, 201, 174 S.E.2d 397, 399 (1970) (There exists in every contract an implied covenant of good faith and fair dealing). Therefore, the AAA Healthcare Policy Statement would not preclude arbitration even if the Arbitration Agreement did require AAA administration.

Conclusion

Based on the above facts and law, the Court will enforce the Arbitration Agreement in accordance with Section 4 of the FAA (9 U.S.C. § 4). Plaintiff shall assert his claims against the Defendants in arbitration pursuant to the Arbitration Agreement. This matter shall be stayed pending completion of the arbitration pursuant to Section 3 of the FAA (9 U.S.C. § 3).

IT IS SO ORDERED.


Honorable G. Thomas Cooper, Jr.
Resident Judge Fifth Judicial Circuit

December 21, 2009
Columbia, South Carolina

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Charles H. Boland, individually and as
Personal Representative of the Estate of
Lucille Rebecca Stafford, deceased,

Plaintiff,

v.

Unihealth Post Acute Care – Columbia,
LLC, d/b/a Carolina Health & Rehabilitation)
f/k/a Central Carolina Health &
Rehabilitative Center,

Defendant.

IN THE COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

CIVIL ACTION NO. 2009-CP-40-1611

ORDER

RICHLAND COUNTY
FILED
2010 JAN 12 AM 9:58
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter came before the court on October 19, 2009 upon Defendant's motion to dismiss and compel arbitration or, alternatively, to compel arbitration and stay proceedings filed on May 12, 2009. Plaintiff was represented by Robert Ransom, Esquire and Defendant was represented by William Rissler, Esquire. Defendant's motion to dismiss and compel arbitration or, alternatively, to compel arbitration and stay proceedings is granted.

PROCEDURAL HISTORY

This cause of action was initiated by the filing of a summons and complaint on March 9, 2009. On April 15, 2009, Defendant filed a Notice of Removal to the United States District Court for the District of South Carolina. An amended complaint substituting UniHealth Post-Acute Care – Columbia, LLC ("Unihealth") as Defendant was subsequently filed by Plaintiff in the Federal Court on April 20, 2009. The parties thereafter agreed to a consent order of remand returning the case to the Richland County Court of Common Pleas, entered by the Federal Court on April 29, 2009. Defendant filed its motion to dismiss and compel arbitration, or alternatively to compel arbitration and stay proceedings on May 12, 2009.

FACTUAL BACKGROUND

On August 11, 2006, Lucille Stafford ("Ms. Stafford") was admitted to Carolina Health & Rehabilitation ("Carolina Health"), a skilled nursing facility operated by UniHealth located in Columbia, South Carolina, by her son and power of attorney, Charles Boland. In connection with Ms. Stafford's admission to Carolina Health, Plaintiff signed an arbitration agreement. Ms.

Stafford died on November 20, 2006 and Plaintiff brought this suit alleging wrongful death and survival causes of action.

The issue raised in this motion is whether Plaintiff should be compelled to bring his claims against Defendant pursuant to the arbitration agreement. Plaintiff makes several arguments against compelling arbitration. First, Plaintiff contends the arbitration agreement is subject to the South Carolina Uniform Arbitration Act ("UAA") and that the statutory notice requirement was not met. Second, he argues that the arbitration agreement designates the American Arbitration Association ("AAA") as the forum to hear the dispute. However, due to AAA policy changes the forum is not longer available; thus, making the agreement to arbitrate unenforceable. Lastly, Plaintiff asserts that Defendant has waived its right to enforce the arbitration agreement. Defendant contends the arbitration agreement is subject to the Federal Arbitration Act ("FAA"); therefore, pre-empting the notice requirement of South Carolina's UAA. Defendant also contends that the arbitration agreement does not designate the AAA as the forum to hear the dispute. In the alternative, it argues that if the AAA is the designated forum to hear the dispute, the AAA policy change does not prevent them from hearing the dispute. Finally, Defendant argues it has not waived its right to enforce the arbitration agreement.

DISCUSSION

1. The Arbitration Agreement is subject to the Federal Arbitration Act.

Both federal and state policies favor the arbitration of disputes where the parties have agreed in advance to resolve their disputes by arbitration. *Grant v. Magnolia Manor-Greentwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). Arbitration is a matter of contract law and is only available when the parties involved contractually agreed to arbitrate. *Towles v. United Healthcare Corp.*, 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999); *South Carolina Pub. Serv. Auth. v. Great W. Coal*, 312 S.C. 559, 437 S.E.2d 22 (1993). Arbitration agreements, like other contracts, are enforceable in accordance with their terms. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364. (2001); quoting *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248 (1989).

Section 5 of the Arbitration Agreement clearly indicates the applicable law that governs agreement. The agreement states "the enforcement this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act." This agreement should be enforced in

accordance with its terms and is therefore subject to the FAA. Thus, the notification requirement of the South Carolina UAA is inapplicable.

2. The Arbitration Agreement does not designate the AAA as the sole forum to hear this dispute.

Arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81; 83, 311 S.E.2d 78, 79 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988). A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute. *Grant*, 383 S.C. at 129, 678 S.E.2d at 437-38.

The Arbitration Agreement in this contract provides, in part:

It is hereby understood and agreed by Carolina Health & Rehab and Charles Boland and or "Authorized Representative," together (referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration.

[Emphasis in original]. The Arbitration Agreement further declares the parties' intention to resolve any dispute solely by arbitration by stating: "This means that the parties are waiving their right to a trial before a jury or a judge." This language is clear and unambiguous and susceptible of no other interpretation than any claims relating to admission, are required to be resolved "exclusively by binding arbitration." Plaintiff does not dispute that he is obligated by this language to arbitrate his claims, but argues that another provision requires any arbitration to be administered by the AAA.

ad #3

The Arbitration Agreement in the present case does not require arbitration to be administered by any particular agency but merely provides that "[a]ny arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ('AAA') and any resulting decision shall be enforceable by a court of competent jurisdiction." Arbitration Agreement ¶ 2 (emphasis added). This language is clear and unambiguous, and susceptible of only one interpretation that the arbitration must "follow the rules of the [AAA]," and it does not require that the arbitration be administered by the AAA. Based on this Court's finding that the AAA is not the sole forum to hear the dispute, the issue of whether AAA policy changes make the forum no longer available need not be addressed.

3. **Defendant has not waived its right to enforce the Arbitration Agreement.**

The right to enforce an arbitration agreement may be waived. *MailSource, LLC v. M.A. Bailey & Assoc., Inc.*, 356 S.C. 370, 588 S.E.2d 639 (Ct. App. 2003). "There is no set rule as to what constitutes a waiver of the right to arbitrate; the question depends on the facts of each case." *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007)(quoting *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct.App.1999)). Generally, South Carolina courts consider the following factors in determining if a party waived its right to compel arbitration:

- (1) whether a substantial length of time transpired between the commencement of the action and the commencement of the motion to compel arbitration;
- (2) whether the party requesting arbitration engaged in extensive discovery before moving to compel arbitration; and
- (3) whether the non-moving party was prejudiced by the delay in seeking arbitration.

Id. These factors are not mutually exclusive and may be inextricably connected to, and influenced by, the others. *Id.* In order to establish waiver of right to enforce arbitration clause, party must show also prejudice through undue burden caused by delay in demanding arbitration. *Toler's Cove Homeowners Ass'n., Inc. v. Trident Const. Co., Inc.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Mere inconvenience to opposing party is not sufficient to establish prejudice. *Id.*

Plaintiff asserts he first contacted Defendant about a possible claim by a letter dated February 29, 2008. He then submitted a formal, documented claim to Defendant's insurance representative on April 23, 2008. The parties were unable to reach an agreement about the claim. Plaintiff filed a notice of intent to file suit with the Richland County Clerk of Court on September 4, 2008. Furthermore, the parties participated in mandatory pre-suit mediation in

Charleston, South Carolina on December 9, 2008. Defendant claims that the issue of arbitration was raised as an issue in an e-mail prepared by Plaintiff's counsel on or about October 13, 2008.

All of the circumstances that Plaintiff presents as evidence of Defendant's waiver of its right to enforce the Arbitration Agreement occurred prior to commencement of the action and this Court finds no instances in South Carolina law where activity engaged in prior to commencement of the action constitutes a basis for finding that a Defendant has waived its right to enforce an arbitration agreement. As to Defendant's participation in mandatory pre-suit mediation, this Court sees no basis to find that Defendant's participation in statutorily required mediation constitutes waiver of its right to enforce the Arbitration Agreement. S.C. Code Ann. § 15-79-125(c)(Supp. 2005)(requiring pre-suit mediation prior to the commencement of a medical malpractice action). In *General Equipment & Supply Company, Inc. v. Keller Riggins & Construction, SC, Inc.*, the court found that a Plaintiff was not prejudiced and Defendant had not waived its right to enforce an arbitration agreement where the parties were involved in litigation for eight months and had both consented to the referral of the case to the Master-in-Equity prior to the filing of Defendant's motion to compel arbitration. 344 S.C. 553, 544 S.E.2d 643 (Ct. App. 2001). Finally, prior to commencement of the action, both parties engaged in course of conduct with the intention of settling their dispute. To find that this conduct constitutes a waiver of Defendant's right to arbitrate would be contrary to the well-established principle of encouraging settlement of disputes. See *Rock Smith Chevrolet, Inc. v. Smith*, 309 S.C. 91, 92, 419 S.E.2d 841, 842 (stating "[i]t has long been the policy of the court to encourage settlement in lieu of litigation").

There is no set rule concerning what constitutes a waiver of the right to arbitrate and this Court finds that facts of this case do not support waiver. Any action to compel arbitration prior to Plaintiff's commence of the action would have been premature. Though the law suit was first commenced on March 9, 2009, Defendant was not formally made a party to the proceeding until April 20, 2009. Defendant raised the Arbitration Agreement as an issue in its first responsive pleading filed on May 12, 2009. A substantial length of time had not transpired between the commencement of the action and the filing of the motion to compel arbitration. Furthermore, Defendant has not engaged in extensive discovery or otherwise indicated any intent to litigate. Lastly, Plaintiff has not demonstrated that he was prejudiced or suffered any undue burden between the commencement of the action and the filing of the motion to compel arbitration.

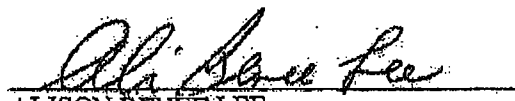


Therefore, this Court finds that Defendant has not waived its right to enforce the Arbitration Agreement.

ORDER

Based upon the foregoing, it is **ORDERED**, that the parties proceed to binding arbitration in accordance with the arbitration agreement and this action is dismissed.

AND IT IS SO ORDERED.


ALISON RENEE LEE
Presiding Judge

January 11, 2010
Columbia, South Carolina

af
ee

EXHIBIT F

Medicare Secondary Payor Source Questioner

PART I:

1. Are you receiving Black Lung (BL) Benefits?

_____ Yes; Date benefits began: _____

BL IS PRIMARY ONLY FOR CLAIMS RELATED TO BL

☒ No; Go to PART II

2. Are the services to be paid by a government program such as a research grant?

_____ Yes; Government Program will pay primary benefits for these services.

☒ No.

3. Has the Department of Veterans Affairs (DVA) authorized and agreed to pay for care at this facility?

_____ Yes; DVA IS PRIMARY FOR THESE SERVICES.

☒ No.

4. Was the illness/injury due to a work related accident/condition?

_____ Yes; Date of injury/illness: _____

Name and Date of WC plan:

Policy or identification number: _____

Name and address of your employer:

WC IS PRIMARY PAYER ONLY FOR CLAIMS RELATED TO WORK RELATED INJURIES OR ILLNESS. GO TO PART III

☒ No; GO TO PART III

Medicare Secondary Payor Source Questioner (Cont.)

PART II:

1. Was Illness/Injury due to a non-work related accident?

_____ Yes; Date of accident: _____

☒ No; Go To PART III

2. What type of accident caused illness/injury?

_____ Automobile

_____ Non-automobile

Name and address of no-fault or liability insurer:

Insurance Claim Number: _____

LIABILITY INSURER IS PRIMARY ONLY FOR THOSE CLAIMS RELATED TO THE ACCIDENT. GO TO PART III

_____ Other

3. Was another party responsible for this accident?

_____ Yes

Name and Address of Any Liability Insurer:

Insurance Claim Number: _____

LIABILITY INSURER IS PRIMARY ONLY FOR THOSE CLAIMS RELATED TO THE ACCIDENT. GO TO PART III

☒ No; Go to PART III

Medicare Secondary Payor Source Questioner (Cont.)

PART III:

1. Are you entitled to Medicare based on:

_____ Age. Go to Part IV.

_____ Disability. Go To Part V.

_____ ESRD. Go To Part IV.

Part IV - Age

1. Are you currently employed?

_____ Yes;

Name and address of employer:

☒ No. Date of Retirement _____

2. Is your spouse currently employed?

_____ Yes;

Name and address of employer:

_____ No. Date of Retirement _____

IF THE PATIENT ANSWERED NO TO BOTH QUESTIONS 1 AND 2, MEDICARE IS PRIMARY UNLESS THE PATIENT ANSWERED YES TO QUESTIONS IN PART I OR II. DO NOT PROCEED ANY FURTHER.

3. Do you have a group health plan (GHP) coverage based on your own, or spouse's, current employment?

_____ Yes

☒ No; STOP: MEDICARE IS PRIMARY PAYER UNLESS THE PATIENT ANSWERED YES TO THE QUESTIONS IN PART I OR II

Medicare Secondary Payor Source Questioner (Cont.)

4. Does the employer that sponsors your GHP employ 20 or more employees?

 Yes, STOP. GROUP HEALTH PLAN IS PRIMARY. OBTAIN THE FOLLOWING INFORMATION.

Name and Address of GHP:

Policy identification number: _____

Group identification number: _____

Name of policy holder: _____

Relationship to patient: _____

 No; STOP: MEDICARE IS PRIMARY PAYER UNLESS THE PATIENT ANSWERED YES TO QUESTIONS IN PART I OR II.

PART V:

1. Are you currently employed?

 Yes

Name and address of employer:

☒ No; Date of retirement: _____

2. Is a family member currently employed?

 Yes;

Name and address of employer:

Medicare Secondary Payor Source Questioner (Cont.)

☒ No;

IF THE PATIENT ANSWERED NO TO BOTH QUESTIONS 1 AND 2, MEDICARE IS PRIMARY UNLESS THE PATIENT ANSWERED YES TO QUESTIONS IN PART I OR II. DO NOT PROCEED ANY FURTHER.

3. Do you have group health plan (GHP) coverage based on your own, or a family member's, current employment?

☐ Yes

☒ No; STOP. MEDICARE IS PRIMARY UNLESS THE PATIENT ANSWERED YES TO QUESTIONS IN PART I OR II.

4. Does the employer that sponsors your GHP employ 100 or more employees?

☐ Yes; STOP: GHP IS PRIMARY PAYER. OBTAIN THE FOLLOWING INFORMATION.

Name and Address of GHP:

Policy identification number: _____

Group identification number: _____

Name of policy holder: _____

Relationship to patient: _____

☒ No; STOP MEDICARE IS PRIMARY PAYER UNLESS THE PATIENT ANSWERED YES TO QUESTIONS IN PART I OR II

PART - VI

1. Do you have group health plan (GHP) coverage?

☐ Yes

Medicare Secondary Payor Source Questioner (Cont.)

Name and Address of GHP:

Policy identification number: _____

Group identification number: _____

Name of policy holder: _____

Relationship to patient: _____

Name and address of employer, if any, from which you receive GHP coverage:

☒ No. STOP. MEDICARE IS PRIMARY.

2. Have you received a kidney transplant?

____ Yes. Date of transplant: _____

☒ No.

3. Have you received maintenance dialysis treatments?

____ Yes. Date dialysis began: _____

IF YOU PARTICIPATED IN A SELF DIALYSIS TRAINING PROGRAM,
PROVIDE DATE TRAINING STARTED: _____

☒ No.

4. Are you within the 30 month coordination period?

____ Yes.

☒ No; STOP. MEDICARE IS PRIMARY.

5. Are you entitled to Medicare on the basis of either ESRD and age or ESRD and ?

____ Yes.

Medicare Secondary Payor Source Questioner (Cont.)

☒ No; STOP. GHP IS PRIMARY DURING THE 30 MONTH COORDINATION PERIOD.

6. Was your initial entitlement to Medicare (including simultaneous entitlement) based on ESRD?

☐ Yes; STOP. GHP CONTINUES TO PAY PRIMARY DURING THE 30 MONTH COORDINATION.

☒ No.

7. Does the working aged or disability MSP provision apply (i.e., is the GHP primary based on age or disability entitlement)?

☐ Yes; GHP CONTINUES TO PAY PRIMARY DURING THE 30 MONTH COORDINATION PERIOD.

☒ NO; MEDICARE CONTINUES TO PAY PRIMARY.

8.

402. WAIVER OF HEALTH BENEFITS AS CONDITION OF ADMISSION

You may not require, as a condition of admission or treatment, a patient to agree to waive his/her right to have your services paid for under Medicare. Requiring such a waiver is inconsistent with your contract with HCFA, and the waiver is not binding upon the patient. You have agreed not to charge an individual (except for specified co-insurance amounts) for services for which the individual is entitled to have payment made or for which he/she would be entitled if you complied with the procedural and other requirements of the program. Further, under this provision, you must refund any amounts incorrectly collected.

When a patient who has signed a waiver request payment made under the program, you must bill the intermediary and refund and payments made by the patient or on his/her behalf in excess of permissible charges.

Medicare Coverage Determination

Resident Name: Elizabeth Jones

Facility Name: Heritage of the Low Country

Date of Admission: 4-18-07

☒ Qualifies for Medicare Part A benefits for skilled services related to:

Estimated Coverage: 100 Total Days
20 Full Cover Days
80 Co-Insurance Days

☐ Does not qualify for Medicare Part A benefits because:

Please Initial One:

20

Do you agree with this determination?

☐ If no, do you want a Demand Billing? If you would like to request a Demand Billing, please see the form entitled "Request for Medicare Intermediary Review."

Acknowledgment:

Resident's Signature

[Signature]

Responsible Party's Signature

Sally Adams, SCA
Facility Representative's Signature

4-18-07
Date of Determination

State of South Carolina	)	In the Court of Common Pleas
	)	
County of Hampton	)	C/A Nos: 2010-CP-25-491 & 492
	)	(Survival and Wrongful Death)
Cherry Scott, as Personal	)	
Representative of the Estate	)	
of Elizabeth Jones,	)	
	)	
Plaintiff,	)	Response to Motion to Reconsider
	)	the Denial of Arbitration
vs.	)	
	)	
Heritage Healthcare of	)	
Estill, LLC, d/b/a Heritage	)	
of the Lowcountry, et. al.,	)	
	)	
Defendants,	)	
	)	

Heritage attacks this Court's various rulings within the order denying arbitration. None of the attacks are persuasive.

1. There was no assent to arbitrate.

Arbitration was correctly denied because: 1) the wrongful death beneficiaries did not assent; 2) the decedent's sister lacked authority to assent; and 3) the signatories did not know what they were signing.

The wrongful death beneficiaries' right to recover for their own injuries is distinct from the Estate's recovery for the decedent's injuries. *Complete Auto Transit, Inc. v. Bass*, 229 S.C. 607, 611, 93 S.E.2d 912, 913-914 (1956).

Because these claims are not derivative, courts generally hold that such beneficiaries are not bound to arbitrate unless they themselves assent.¹ In this case, Scott - the Personal Representative bringing the wrongful death claims - never agreed to arbitrate. Rather Jenkins, Jones's sister, signed as Jones's "Representative." This does not bind the wrongful death beneficiaries.

Jenkins's purported assent similarly fails to bind the Estate because she lacked authority to contract away Jones's right to a jury trial. Jones was competent to decide for herself whether she would give up her right to a jury, and was "not required to sign this Arbitration Agreement in order to be admitted to or remain in the Facility." Arbitration Agreement, ¶ 6. Courts facing such side agreements uniformly hold that unauthorized signatories do not bind an estate to arbitrate when arbitration was always optional.²

Heritage acts as if it required arbitration for admission. It did not.

¹See, e.g., *Ward v. National Healthcare Corp.*, 275 S.W.3d 236 (Mo. 2009) (holding that a family member who signed as the decedent's "legal representative" did not bind her or the other the wrongful death beneficiaries to arbitrate); *Carter v. SSC Odin Operating Co., LLC*, 353 Ill.Dec. 422, 432, 955 N.E.2d 1233, 1243 (Ill.App. 2011)(same; citations omitted); *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wash.App. 919, 231 P.3d 1252 (Wash.App. 2010)(same; decedent signed).

²See, e.g., *Stalley v. Transitional Hosp. Corp. of Tampa, Inc.*, 44 So.2d 627 (Fla.App. 2010)(holding that the third-party beneficiary theory did not apply where arbitration was optional); *Monticello Cmty. Care Ctr., LLC v. Martin*, 17 So.3d 172, 179 (Miss.App. 2009)(same); *Barker v. Evangelical Lutheran Good Samaritan Soc'y*, 720 F.Supp.2d 1263 (D.N.M. 2010)(same).

Heritage lastly proffers a hypothetical loan officer to argue that there was a meeting of the minds to arbitrate despite its signatory's frank admission that she does not know what arbitration agreements are or how a resident or family member could know. Order Denying Arbitration, pp. 7-8. To use its example against it, Heritage would have the Court find that a wholly separate - and completely optional - agreement to secure a loan is enforceable even though the loan officer does not have a clue about what a security agreement is or how its customer could know. This is not assent.

2. *Timms* controls until the South Carolina Supreme Court says different.

Heritage further re-argues why it believes that the United States Supreme Court overruled *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993). The argument is misplaced. In *State v. Watts*, 320 S.C. 377, 382 n.1, 465 S.E.2d 359, 363 n.1 (S.C.App. 1995), the Court noted that a United States Supreme Court decision on federal law arguably conflicted with an earlier South Carolina Supreme Court decision. The Court of Appeals nevertheless held that it was constrained to adhere to the South Carolina Supreme Court precedent. This Court is likewise constrained to apply *Timms*.

On a related note, this Court properly ruled that parties may not simply stipulate to the interstate commerce requirement. See *Munoz v. Green*

Tree Financial Corp., 343 S.C. 531, 538-539, 542 S.E.2d 360, 363 (2001)

(holding that whether the parties contemplated interstate commerce is not a factor in determining if the Federal Arbitration Act applies).

3. Heritage waived arbitration.

Heritage also attacks this Court's finding that it waived arbitration and argues that this issue must in any event be decided by the arbitrator.

On the merits, Heritage wants the Court to disregard its pre-suit maneuvering. It could have petitioned for arbitration once it was served with the Notice of Intent on or about April 7, 2010. *See* 9 U.S.C. § 4 (authorizing pre-suit petitions to compel arbitration). Heritage did not. It instead availed itself - twice - of the statutory and court-ordered mediation that is required only if the claims are litigated rather than arbitrated. These mediations allowed Heritage to gain discovery, and forced Scott to prepare for and undergo two mediations.

The Court of Appeals just a few months ago also reviewed which issues are for the arbitrator and which issues are for the court - and affirmed the court's finding of waiver. *Davis v. KB Home of South Carolina, Inc.*, 394 S.C. 116, 713 S.E.2d 799 (S.C.App. 2011).

4. *Magnolia Manor* controls.

Heritage lastly attacks this Court's reliance on *Grant v. Magnolia Manor*, 383 S.C. 125, 678 S.E.2d 435 (2009). The case is spot on.

Magnolia Manor, for example, directly rebuts Heritage's contention that the AAA is available because Scott can consent - post-injury - to arbitrate there. The forum in *Magnolia Manor* was also available if the plaintiff entered into a post-injury agreement to arbitrate. The Supreme Court held that the pre-injury agreement was unenforceable without requiring the plaintiff to enter into a second post-injury agreement.

Heritage next tries to distinguish *Magnolia Manor* by saying that its form neither requires an AAA arbitrator nor AAA administration. The form's face, however, requires that the arbitrator be "selected in accordance with the rules of the AAA." Agreement, ¶ 2. These rules require that the AAA select the arbitrator from its AAA National Roster. Order Denying Arbitration, p. 4.

The distinction between requiring use of the AAA rules and requiring AAA administration is as elusive. Only one of the decisions that Heritage cites deals with any of the AAA rules that this Court relied to reject the distinction. Order Denying Arbitration, pp. 3-4. In that decision, a district court judge reasoned that AAA Rule R-2 does not mean that the AAA is the

exclusive forum. Yet Rule R-2 authorizes only the AAA - and no one else - to administer its AAA rules. As significantly, the AAA explicitly claims copyright protection against its rules' unauthorized use. Order Denying Arbitration, p. 4. The Court may thus not simply appoint a non-AAA arbitrator and order him or her to apply the AAA rules without running headlong into this asserted copyright. None of Heritage's citations address this copyright protection.

Heritage lastly argues that the AAA is not required because its rules are not integral. But the form lists no other way to either select an arbitrator or proceed with arbitration. The AAA is it. The provisions are thus as integral as the ones in *Magnolia Manor*.

Conclusion

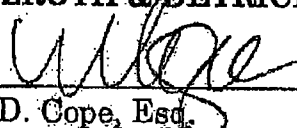
The Admissions Director of a local corporation had an unauthorized family member sign an optional arbitration form without the Director having a clue about what arbitration is. This separate form requires using AAA rules to select the arbitrator and proceed with the arbitration - even though the AAA quit arbitrating such claims years earlier. Heritage now wants the Court to ignore its litigation maneuvering, re-write its form, and enforce the judicially-crafted form against those who never assented to arbitrate.

The Court should decline the invitation and deny reconsideration.

**PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P.A.**

Hampton, SC

12/13, 2011

By: 

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Attorneys for the Plaintiff

FILED

2012 FEB 23 AM 11:31

MYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

BY _____ APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge.

RECEIVED
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SC Court of Appeals

Case No. 2010-CP-25-491 and 492

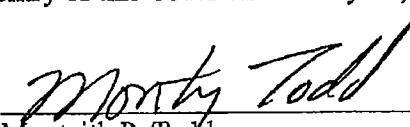
Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones Respondent,
v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United
Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. Appellants.

NOTICE OF APPEAL

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation appeal the Order Denying Defendants' Motion to Compel Arbitration of the Honorable Carmen T. Mullen dated November 3, 2011, and the Form 4 Order Denying Defendants' Motion for Reconsideration of the Honorable Carmen T. Mullen dated January 11, 2012. Appellants received written notice of entry of this Order on January 25, 2012.

February 2, 2012



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JAN 25 2012

STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

BY: _____

CASE NO. 2010 CP-25-491, 492

Cherry T. Scott, as PR of Estate of Elizabeth Jones

Heritage Healthcare of Estill, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Monteith P. Todd

Attorney for : ☐ Plaintiff ☒ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment, by the Court: Defendant's Motion for Reconsideration is respectfully denied *with a hearing*.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge
SCRPC Form 4C (12/2011)

ROA-564

Judge Code

Date

Page 1

2142

1-11-12

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE DEFENDANT(S)

Mylinda Nettles - Clerk of Court

Court Reporter

Recd 11/21/11
File 5593/1507STATE OF SOUTH CAROLINA
COUNTY OF HAMPTON
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP2500491

2010 CP-25-492

Cherry Scott	Elizabeth Jones FILED NOV - 9 2011 @ 2:05pm CLERK OF COURT HAMPTON COUNTY PLAINTIFF(S)	Heritage Healthcare Of Estill Llc Uni-Health Post Acute Care of the Lowcountry UHS Pruitt Corp	Heritage of the Lowcountry United Clinical Services Inc United Rehab Inc DEFENDANT(S)

Submitted by: CLERK OF COURT	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER DENYING MOTION TO COMPEL ARBITRATION FILED 11-09-2011 SIGNED BY JUDGE MULLEN

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE PUBLIC INDEX

Complete the section below when the judgment is due to be paid or recorded in and by an amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

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Mylynda Nettles - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

CHERRY SCOTT, as Personal
Representative of the Estate of
ELIZABETH JONES)

Plaintiff,)

v.)

HERITAGE HEALTHCARE OF
ESTILL, LLC, d/b/a Heritage of the
Lowcountry and/or Uni--Health Post
Acute Network of the Lowcountry,
UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC.,
And UHS-PRUITT
CORPORATION,)

Defendants,)

IN THE COURT OF COMMON PLEAS

C/A No.: 2010-CP-25-491 & 492
(Survival and Wrongful Death)

**ORDER
DENYING DEFENDANTS'
MOTION TO COMPEL
ARBITRATION**

FILED
2011 NOV -9 PM 2:05
KYLINDA D. NETTLES
CLERK OF COURT
HAMPTON COUNTY, S.C.
BY _____

This matter came before me on October 7, 2011. The Plaintiff was represented by Charles J. McCutchen of Orangeburg and Lee D. Cope of Hampton. The Defendants were represented by Michael Montgomery of Columbia.

BACKGROUND

Ms. Elizabeth Jones was admitted to the Heritage Healthcare of Estill LLC ("HHE") facility on or about April 18, 2007. At that time she was a fifty-nine year old female who plaintiff claims was in good physical condition. During her residency, the Plaintiff, Ms. Cherry Scott, claims that Ms. Jones' condition worsened and that she developed avoidable pressure sores that resulted in her leg being amputated and her eventual death.

Ms. Scott, acting as Personal Representative of her sister's Estate, brought wrongful death and survival claims against HHE and the other defendants on March 23, 2010. The claims

therein are the basis for the Defendants Motion to Stay and to Compel Arbitration. For the reasons set forth below, the Defendants' Motion is denied.

DISCUSSION

The policy of this state is to favor arbitration of disputes. Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co., Inc., 355 S.C. 605, 612, 586 S.E.2d 581 (2003). However, not all arbitration clauses are enforceable. Arbitration is a matter of contract and S.C. courts must determine the enforceability of an arbitration agreement based on principles of contract law. Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). In order to have a valid and enforceable contract, there must be a meeting of the minds as to all essential and material terms of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989).

A. FORUM SELECTED BY DEFENDANT HHE IS NOT AVAILABLE

The Arbitration Agreement between Ms. Jenkins, on behalf of her sister, Ms. Jones, and HHE is not enforceable. There is no dispute that the agreement at issue was prepared by HHE and calls for any "claim or claims" between the resident and HHE to be handled under the auspices of the American Arbitration Association (AAA). The relevant parties of the Arbitration Agreement is as follows:

Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceedings shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

Effective January 1, 2003, the AAA no longer accepts for arbitration cases involving individual patients in a healthcare facility unless there was a post-dispute agreement to arbitrate. According to the pleadings, the dispute between the parties at issue in this case arose on or about February 2008 when the Plaintiff claims that the HHE staff failed to provide sufficient care such that she developed pressure sores. The arbitration agreement was signed on April 17, 2007 by Ms. Jenkins on behalf of Ms. Jones. Therefore the Arbitration Agreement was signed "pre-injury." By its own language, the Resident and Facility Arbitration Agreement is not enforceable as the AAA will not hear the matter and the agreement is silent as to the method by which the arbitration shall be conducted absent the AAA rules.

Our Supreme Court has recently addressed this very issue. In Grant v. Magnolia Manor – Greenwood, Inc. et al, 383 S.C. 125, 678 S.E.2d 435 (2009), the Court held that the selection of a arbitration forum is an "integral part of the agreement." There, the chosen forum, the National Health Lawyers Association, took the same position as the AAA in that it would not administer arbitration of a health care personal injury claim unless the arbitration agreement was entered into after the event giving rise to the claim. Id. Because HHE chose the AAA's rules as the guiding principle for arbitration, it is an integral part of the agreement. The chosen forum also negates the ability to look to the Federal Arbitration Agreement ("FAA") for another means of arbitration. The Grant court held that the chosen means by which an arbitrator will be selected and the "rules that govern the arbitration" are not "logistical" nor "ancillary." Id. The Defendant HHE knew or should have known that the AAA did not recognize these types of arbitration agreements when it entered into it with Ms. Jenkins. It should not look to the Court now to correct its mistake. Accordingly, the arbitration agreement must fail.

Despite the Defendants' contention to the contrary, there is no distinction between a chosen "forum" and an agreement that the parties will use the AAA "rules." In essence the two are inseparable. Rule R-2 of the Commercial Arbitration Rules and Administrative Procedures of the AAA provides as follows:

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authorities and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its officers.

Rule R-3 makes reference to the National Roster of Arbitrators. This Rule provides:

The AAA shall establish and maintain a national roster of commercial arbitrators (National Roster) and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

Rule R-49 addresses administrative fees and provides that: "As a Not-For-Profit Organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the costs of providing administrative services."

Sub-paragraph C of Rule 51 addresses the neutral Arbiter's Compensation and provides that: "Any arrangement"

for the compensation of a neutral arbiter shall be paid through the AAA and not directly between the parties and the arbitrator.

The American Arbitration Association Rules conclude by revealing that:

These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Unauthorized use or modification of these rules may violate copy write laws and other applicable laws.

Therefore, there is no discernible difference between the AAA as a "forum" or simply using the AAA's "rules."

Thus, an integral component of the parties' agreement has failed. As Grant dictates, when the forum fails the agreement fails and the parties cannot look to the FAA for a replacement forum.

B. The FAA is not involved as there is no interstate commerce in the agreement

In addition to Grant, there are reasons why this Court will not look to the FAA to "fix" the arbitration agreement as drafted by HHE. The agreement of the parties is not a transaction involving interstate commerce. This issue was addressed by the South Carolina Supreme Court in the case of Tims vs. Green, 310 S.C. 469, 427, S.E.2d 642 (1993). The Tims case involved an action by a nursing home resident seeking damages for injuries sustained while she was left unattended under a hair dryer at defendant's facility. The arbitration agreement between Tims and the Defendant required submission of any dispute to binding arbitration. The Defendant argued that interstate commerce was involved in the contract as the defendant was a division of a national corporation; it hired employees from out of state; it marketed its services out of state; purchased majority of its goods and equipment from out of state; and contemplated payments from Medicare and Medicaid. The lower court disagreed with the Defendants position finding the contract did not involve interstate commerce rendering the FAA moot. This was affirmed on appeal by the Supreme Court. The Court in Tims stated "although these factors could evidence the centers involvement in interstate commerce we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." Id.

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between Tims and the Defendant, the Supreme Court refused to require arbitration because the Plaintiff's cause of action was not subject to the Arbitration Act of South Carolina and the Federal Arbitration Act was inapplicable.

In this case, there is no evidence of interstate commerce in the arbitration agreement between the parties. The contract was entered into between Ms. Jenkins, a South Carolina resident and Heritage Healthcare of Estill, LLC, a South Carolina LLC. The agreement is void as to any issues of interstate commerce between the parties to the agreement. Furthermore, there has been no evidence of any interstate commerce between the parties to the arbitration agreement.

The Defendants' contention that interstate commerce is stipulated between the parties to the agreement is unavailing. Just as parties cannot "stipulate" to subject matter jurisdiction, parties cannot "stipulate" to interstate commerce that would invoke the FAA. It is not enough to say it must be evidenced in the contract itself. Tims.

Defendants' reference to the fact that Georgia corporations are also defendants is immaterial and not a basis for finding that the arbitration agreement involves interstate commerce. The agreement itself, the focus of this inquiry, does not mention any out of state entity. The agreement specifically limits arbitration to disputes involving the resident and the "facility." The "facility" is HHE, d/b/a Heritage of the Low Country. That is the facility listed in the arbitration agreement and that is the facility as set forth in the pleadings. There is no evidence that Ms. Jenkins knew or should have known of the existence of the out of state corporations at the time she entered into this admission agreement. In addition, the responsive pleadings of the out of state corporations deny that they are responsible for the care provided at

the HHE facility. Moreover, there is no signed arbitration agreement or any other contract signed by the Plaintiff and UHS Pruitt, United Rehab and/or United Clinical Services. Accordingly, the FAA does not apply.

As the forum and rules of arbitration chosen by the Defendants in the case at bar are no longer available to the parties, the agreement must be strictly construed against defendant HHE.

C. THERE IS NO MEETING OF THE MINDS

The Court is also concerned about the lack of understanding between the parties in the case as to what exactly was being agreed upon. In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. Player v. Chandler, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into. The admission director for HHE, Ms. Sally Dobson, was deposed on May 5, 2011 involving the arbitration agreement. She testified that she and the administrator explain to residents and family members that arbitration means that if "they have any complaints or any concerns that are not being taken care of in a timely manner then we can go into arbitration." When asked if she was aware that the arbitration agreement required adherence to the AAA rules, she testified as follows:

11

- 23 Q Did you know, Ms. Dobson, that the Arbitration
24 Agreement that we're here about today contains a
25 provision that the American Arbitration Association

12

- 1 rules have to be followed? Were you aware of that?
2 A If it's on that sheet of paper, Well, I don't know what
3 the Arbitration Agreements are.
4 Q Well, how is it if you don't know, how would a resident
5 know or their family member?
6 A I don't know.
7 Q Well, don't you think that's an important part of it?
8 A It is.

- 9 Q It's a material part of the contract?
10 A It is.
11 Q And but you don't know what it is?
12 A But I don't know what it is.
13 Q And so you can't expect a resident to know?
14 A That's --
15 MR. RISSLER: Object to the form.
16 A -- correct.
17 Q or their personal representative?
18 A Uh-huh (affirmative).
19 Q Right?
20 A Right.
21 Q Or power of attorney, right?
22 A Right.
23 Q Or their family member?
24 A Right.

The person HHE selected as the person to instruct residents and family members on the documents that they must sign in order to be admitted to the facility does not know what those very documents mean. Quite candidly, she further admits that there is no meeting of the minds as to an integral part of the contract. Accordingly, there is no meeting of the minds and the arbitration agreement must fail.

D. THE DEFENDANTS HAVE WAIVED ARBITRATION

Assuming that the arbitration agreement was valid or that the FAA applied, the Court finds that the Defendants have waived their right to arbitrate these claims. Parties can waive their right to enforce an arbitration agreement. Liberty Builders, Inc. v. Horton, 336 S.C. 658, 521 S.E.2d 749 (Ct.App. 1999) There are three factors generally considered to determine if a party has waived its right to enforce an arbitration clause: 1) the time between commencement of the action and moving for arbitration, 2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration, and 3) prejudice to the non-moving party which must be more than mere inconvenience. Rhodes v. Benson Chrysler-Plymouth, Inc., 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

The Defendants waited too long to move for arbitration. The Plaintiff began these proceedings by filing a Notice of Intent that was served on the Defendants on or about April 7, 2010. After participating in the Notice of Intent proceedings and a failed mediation, the summons and complaint was filed on October 13, 2010. The instant motion was not filed until August 4, 2011. A nursing home negligence action cannot be commenced until the Plaintiff has filed and served a Notice of Intent. Thus, it is that action that is the appropriate starting place for determining when the party seeking arbitration could have moved to compel arbitration. In fact, S.C. Code 15-79-120 specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. The Defendants waited fourteen months before moving for arbitration. Our Courts have held that less time constitutes waiver. Rhodes, 374 S.C. at 125, 128 S.E.2d at 250, 252 (Ct. App. 2007)

During the long wait, the Defendants engaged in discovery. The Defendants decided to serve and answer discovery. The Defendants decided to take and defend depositions. The Defendants decided to participate in a pre-suit mediation on September 10, 2010 and a second mediation on August 11, 2011. The Defendants decided to participate in procedural and discovery hearings with the Court rather than move to compel arbitration. The Defendants decided to produce 6,211 pages of discovery documents during the course of this litigation. The Defendants have repeatedly availed themselves of this court system for the past sixteen months.

The prejudice to the Plaintiff is more than mere inconvenience. The parties have conducted extensive discovery, participated in two mediations, and attended two Court hearings. Our Courts have held that the cost associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. Evans v. Accent Manufactured Homes, Inc., 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). This Court finds that

significant time and money has been spent by the Plaintiff on a course of action that the Defendant could have sought to avoid much earlier on. The Defendants can point to no reasonable basis for waiting this long to move for arbitration. The only logical explanation for moving at this stage to compel arbitration is unnecessary delay and unfair prejudice to the Plaintiff. Accordingly, the Court finds that the Defendants have waived their right to arbitrate these claims, even if the arbitration agreement was valid.

E. MS. JENKINS LACKED STANDING TO ENTER INTO ARBITRATION AGREEMENT

The Arbitration Agreement also fails for lack of standing. On the date of Ms. Jones' admission, the nursing home staff performed an evaluation and found her to be mentally competent. Despite this finding, the staff failed to obtain her consent to the terms of the Arbitration Agreement. Instead, the HHE staff had her sister, Ms. Ellen Jenkins, sign the Arbitration Agreement despite the fact she did not have a Power of Attorney from Ms. Jones or any other legal basis to enter into this agreement.

In order for a person to be bound by a contract, the person signing must have standing to enter into the contract. In this case, there has been no evidence that Ms. Jenkins had the authority to bind her sister to the Arbitration Agreement. Therefore the standing element has not been met.

Likewise, there is no evidence that Ms. Jenkins had the apparent authority to enter in the Arbitration Agreement. Whether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. American Fed. Bank, FSB v. Number One Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); Hinson v. Roof, 128 S.C. 470, 122 S.E. 488 (1924). It is the duty of an entity dealing with an agent to use due care to ascertain the full extent of the agent's authority.

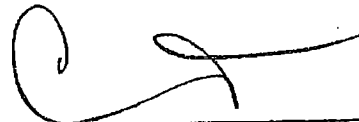
Frasier v. Palmetto Homes of Florence, 323 S.C. 240, 473 S.E.2d 865 (Ct.App. 1996). The Defendants have not produced any evidence that Ms. Jones knew Ms. Jenkins had signed an Arbitration Agreement on her behalf; much less any evidence that she authorized or acquiesced to this act. Accordingly, the Court finds Ms. Jenkins did not have the authority to sign the Arbitration Agreement for Ms. Jones.

CONCLUSION

Our Court's policy of favoring arbitration does not override the basic requirements of contracts in South Carolina. In this matter, Ms. Jenkins did not have the legal or apparent authority to enter into an arbitration agreement for her sister Ms. Jones. Even if she did have the authority, there was no meeting of the minds as to what exactly was being entered into. The Defendant's agent admitted she did not know what it meant. Furthermore, the forum selected by the Defendant will not hear this type of dispute. Our Supreme Court has determined that the forum selection is an integral part of the agreement and cannot be remedied by following the FAA which does not apply to this intrastate agreement. Moreover, the Defendants have waited too long to move for arbitration and have substantially prejudiced the Plaintiff in the process such that any arbitration that it could have sought to compel is waived.

Therefore, the Defendants' Motion to Stay and Compel Arbitration is denied.

And it is so ordered.



The Honorable Carmen T. Mullen
Presiding Judge

Beaufort, SC
November 3, 2011

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones Respondent,
v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United
Clinical Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. Appellants.

CERTIFICATE OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp & Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel in this action with a copy of the Notice of Appeal by mailing a copy of same to counsel via United States Mail, postage prepaid, at the following address(es):

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RECEIVED
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SC Court of Appeals

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Robin C. Owens
Robin C. Owens
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2/2, 2012

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF COLLETON) CASE NO.: 2010-CP-25-0489 & 0490
2010-CP-25-0491 & 0492

LINDA JOHNSON, AS PERSONAL REPRESENTATIVE OF THE)
ESTATE OF INEZ ROBERTS,)

PLAINTIFF,)

v.)

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a HERITAGE)
OF THE LOWCOUNTRY AND/OR d/b/a UNIHEALTH POST ACUTE)
CARE OF THE LOWCOUNTRY, ET AL.)

DEFENDANTS.)

Transcript of Record

CHERRY SCOTT, AS PERSONAL REPRESENTATIVE OF THE)
ESTATE OF ELIZABETH JONES,)

PLAINTIFF,)

v.)

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a HERITAGE)
OF THE LOWCOUNTRY AND/OR d/b/a UNIHEALTH POST ACUTE)
CARE OF THE LOWCOUNTRY, ET AL.)

DEFENDANTS.)

FEBRUARY 11th, 2011
JASPER COUNTY COURTHOUSE, SOUTH CAROLINA
BEFORE THE HONORABLE CARMEN T. MULLEN, JUDGE.

APPEARANCES:

MR. LEE DEER COPE, ESQUIRE
PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.
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EXHIBITS

NONE.

1 MR. COPE: Your Honor, I'm Lee Cope, and I guess we
2 have two cases. Let's talk about Linda Johnson, as the
3 Personal Representative of Inez Roberts, first. We
4 essentially move to strike -- it's the same defenses in both
5 the Linda Johnson and Inez Roberts; so in that regard, it
6 will be very similar. We move to strike defenses five, six,
7 seven, nine, ten and eleven. We have agreed on all but one.
8 On defense number five and six, we will be arguing, Your
9 Honor. Those deal with arbitration clauses.

10 THE COURT: Okay. And if you have a copy of whatever
11 I'm going to need to look at.

12 MR. COPE: You want a copy of the answer and the
13 motion, Your Honor?

14 THE COURT: Yeah, do I need to look at the arbitration
15 clause? That would be nice.

16 MR. RISSLER: May I approach, Your Honor?

17 THE COURT: Yes, sir.

18 (MR. RISSLER HANDS DOCUMENTS TO THE COURT.)

19 MR. COPE: There are multiple defendants, Your Honor.
20 Essentially, the pleadings are the same for all. They're
21 all a part of the Pruitt family. If you will recall, Your
22 Honor, you heard motions on this before the litigation was
23 filed; we were trying to get a copy of the nursing home
24 chart of Ms. Roberts.

25 THE COURT: Yes.

1 MR. COPE: And we had Ms. Linda Johnson request,
2 pursuant to the over-regulation, and she was denied. We
3 filed a TRO, there was confusion over scheduling. Then, we
4 had a guardian ad litem appointed, because we thought that's
5 what they had indicated. They refused to produce the
6 records for that. There was a court hearing. There is a
7 transcript that I have here. Eventually, they filed an
8 appeal; that's when Ms. Roberts passed away. We got a PR
9 appointed, and after some haggling after the PR was
10 appointed, we were able to get the chart and the appeal was
11 withdrawn.

12 Then, we filed our notice of intent; there was a
13 mediation, in-person mediation in Charleston, the family was
14 there, the nursing home lawyer and their representative was
15 there, and the case did not settle. We filed suit timely
16 after that and we got an answer that contained all of these
17 defenses.

18 They have agreed that the statute of limitations
19 defense that they've raised is inapplicable; they are
20 withdrawing it. They are withdrawing the defense for
21 assumption of the risk and contributory negligence because
22 they have pled comparative and they're protected in that
23 regard for whatever the law is on comparative.

24 MR. RISSLER: If I may, Your Honor. We're not
25 withdrawing those; we're going to clarify those to show that

1 they are underneath comparative

2 THE COURT: They've got to all be comparative, okay.

3 MR. COPE: Which is why I'm going to strike, Your
4 Honor. They pled comparative, that's the defense, and I
5 believe if I don't move to strike contributory negligence or
6 assumption of the risk, the burden will be much different as
7 to the plaintiff, and so we -- if they're not going to
8 agree, we're still moving to strike it because it's assumed
9 by comparative.

10 Anyhow, what we're here about today, I think, Your
11 Honor, is arbitration. And our position is, I think they've
12 handed up the arbitration agreement -- y'all believe that
13 everything involving her stay is covered by this arbitration
14 agreement, correct?

15 MR. RISSLER: Yeah. All the claims asserted are
16 covered by the arbitration agreement.

17 MR. COPE: Right. We believe there is a waiver, Your
18 Honor. They have availed themselves of this Court back
19 during the TRO, back during the guardian ad litem; all of
20 those things this arbitration agreement they claim was
21 applicable. They participated in the pre-suit mediation.
22 They've answered -- well, they've provided responses to my
23 discovery; they haven't answered yet. We filed a motion to
24 compel this week. They have now served discovery on us. We
25 believe under the applicable law in South Carolina that they

1 have waived their right as to arbitration, and I think a
2 similar case on that would be Liberty Builders, Inc. v.
3 Horton, 336, S.C. 658.

4 What it states, Your Honor, is whether a party waived
5 its right to arbitrate as a legal conclusion subject to de
6 novo review. Nevertheless, the Circuit Court factual
7 findings underlying that conclusion will not be overruled if
8 there is any evidence reasonably supporting it. And under
9 Rhodes v. Benson Chrysler Plymouth, 374, S.C. 122, a party
10 waives its right to enforce an arbitration provision when it
11 delays a demanding arbitration and engages in extensive
12 discovery resulting in prejudice to the party opposing
13 arbitration.

14 Your Honor, this is their form, this Exhibit A that
15 they handed up; they created it. We don't believe it's
16 applicable, but they've waived their right to argue it now.
17 They've been involved in using this Court where they could
18 have claimed arbitration, and quite honestly, Your Honor,
19 I've had other cases where instead of filing an answer, they
20 moved to compel arbitration, and they didn't do that here.
21 They've been involved in discovery and in the other case I
22 had with them in Columbia, they refused to do any discovery.

23 THE COURT: When you say "they", are we talking about
24 Heritage Healthcare?

25 MR. COPE: We're talking about the Pruitt Corporation,

1 which is the parent corporation for this one and the one in
2 Columbia.

3 THE COURT: Okay. Thank you.

4 MR. COPE: Same arbitration provisions. They have yet
5 to move to compel arbitration. They're just evolving into
6 discovery until they see fit to move for arbitration and I
7 think that's what waiver really goes at. Don't put the
8 plaintiff through the burden of going through discovery if
9 you're going to just jump up and claim arbitration where you
10 don't have to do discovery; or if discovery is done in a
11 different format where everything I've had to do and the
12 money I've spent, and the time my client has been waiting,
13 wouldn't have to. So we think that through their own
14 actions, or inactions, they've waived their right to claim
15 arbitration. We move to strike defense five and six.

16 THE COURT: How long has it been going on? I, of
17 course, you told me as far as your notice of intent and all
18 of the rest of it. How long of a time are we talking about?

19 MR. COPE: Your Honor, we would have filed the notice
20 of intent, and I would have thought I had it here, but I
21 believe it would have been last summer. I believe it was in
22 either May or June.

23 MR. RISSLER: Notice of intent was filed in March.

24 THE COURT: Okay. March of 2010.

25 MR. COPE: There's nothing that would have prevented

1 | them from filing at that time to move to compel arbitration
2 | saying we don't have to do this. We've got an arbitration
3 | provision. That's a judicial action. That's a court action.
4 | We've got arbitration, but they put us through that expense,
5 | and I think that's clearly covered by the waiver law.

6 | MR. RISSLER: Judge, the notice of intent was not an
7 | act. The notice of intent triggers mediation requirements,
8 | and we did mediate. The action was not commenced until
9 | after the mediation occurred. That was the first
10 | opportunity that we had to file a responsive pleading. We
11 | filed a timely responsive pleading, and in that responsive
12 | pleading, we included the defenses which he's moving to
13 | strike.

14 | THE COURT: I have a question. You quoted at the very
15 | beginning when he filed his notice of intent saying this is
16 | subject to arbitration, we aren't going under the rules of
17 | notice of intent; this is arbitration.

18 | MR. RISSLER: Well, Judge, there was no obligation to
19 | file a responsive pleading, and the standard for waiver of
20 | arbitration is that the defendant or the party serving
21 | arbitration has availed itself of the court process in
22 | obtaining discovery. We haven't -- the only discovery that
23 | we've filed, and we filed it last week after he filed these
24 | motions to strike the arbitration defenses, is solely to the
25 | issue of arbitration, so that that's it. We're not ---

1 THE COURT: What is the TRO issue that he brought up?
2 What is he talking about?

3 MR. RISSLER: That's a separate issue with a separate
4 claim. It was for medical records. It was not a claim on
5 the merits. It was not one of the claims that we are
6 seeking to compel the arbitration in this case.

7 THE COURT: Was it medical records for either Ms.
8 Robert or Ms. Jones?

9 MR. RISSLER: It was for Ms. Roberts.

10 THE COURT: Ms. Roberts, okay.

11 MR. RISSLER: And that was not a claim on the substance
12 of the care provided. That was a claim that they availed
13 themselves of the Court, filing a claim to get medical
14 records. It's not something where we came in and asked the
15 Court for assistance, and particularly for assistance with
16 respect to the claim that we are seeking to compel the
17 arbitration.

18 And to step back just a little bit, Judge, we are here
19 today on a motion to strike the defenses, that they're
20 inapplicable; not to argue the merits of the defenses. And
21 all we're asking for, Judge, is for a small amount of time
22 to conduct discovery they challenge the arbitration
23 agreement. We would like a small amount of time to conduct
24 limited discovery, limited solely to the arbitration issues,
25 bring the motion before the Court, and then they can argue

1 the merits. Then, they can argue waiver and whatever else
2 they want to argue in defense of the arbitration agreements.
3 That's all we're asking today to be allowed to do.

4 THE COURT: Okay.

5 MR. COPE: Your Honor, the reason I brought up TRO,
6 that's why I asked Mr. Rissler before he started talking,
7 "Are you saying this covers everything?" What he handed to
8 Your Honor says "any and all controversies." We wanted the
9 medical records of our client, they said no. We had a
10 controversy. It was argued before Your Honor on two
11 different occasions. It never once raised motion to compel
12 arbitration.

13 At the time that we instituted the notice of intent,
14 they could have stopped and said, "Wait a minute, what
15 you're wanting us to do is avail ourselves of a judicial
16 operating procedure, mainly those of intent and pre-suit
17 mediation, and then filing of the summons and complaint."
18 They could have said, "No, Exhibit A means we're going to
19 have arbitration, not a pre-suit mediation." They had every
20 opportunity to say that this applies here, and they have yet
21 to do that.

22 Now, I will be honest with Your Honor, I clearly don't
23 think this is applicable; if they ever file a motion to
24 compel arbitration, I'll be prepared for that. But I think
25 at the threshold, we should stop having to wonder how much

1 more time, money and effort are we going to spend doing what
2 we think is right only to be stopped to go look at this
3 arbitration issue. They raised it, they could have said,
4 "We move to compel arbitration right now," and they haven't
5 done that.

6 THE COURT: Whose deposition -- what do you need to do
7 to decide whether or not you're going to file a motion to
8 compel arbitration?

9 MR. RISSLER: He has challenged the authority of the
10 people who have signed the arbitration agreements to act on
11 behalf of the residents. We submitted limited discovery on
12 the issues of authority, on what their claims are, why they
13 think the arbitration agreement is not applicable or is
14 invalid, or otherwise not enforceable; to find out why it is
15 that they challenged the arbitration agreements. Depending
16 on what the responses are to that written discovery, we may
17 need to take the depositions of the people who signed the
18 arbitration agreement and in the Elizabeth Jones' case, the
19 deposition of the plaintiff; in the Roberts' case, the
20 person who signed the agreement is the PR. So we're talking
21 about a total of three depositions.

22 THE COURT: Who is in Ms. Johnson's?

23 MR. RISSLER: Linda Johnson signed -- is the personal
24 representative in the Inez Roberts' case.

25 THE COURT: How is she related?

1 MR. RISSLER: And she also signed the arbitration
2 agreement, so in that case, we would need only her
3 deposition. In the Elizabeth Jones' case, Ellen Jenkins
4 signed the arbitration agreement and the personal
5 representative is Cherry Scott; we may need her deposition
6 as well. And it's going to depend, quite frankly, on what
7 the responses are to the written discovery, but all of this
8 can be taken care of fairly expeditiously. We're not
9 looking for a lot of discovery on this. And we'll be
10 prepared to file our motion to compel arbitration as soon as
11 the written discovery and the depositions are done. If we
12 need to set a scheduling order and set a date by which to
13 complete the discovery and arbitration and then file the
14 motion to compel, we're willing to do that.

15 THE COURT: What's the review of my ruling on this?

16 MR. COPE: De novo, according to -- I mean, as long as
17 there is a factual basis for it, Your Honor, and he's just
18 highlighted another factual basis why there should be waiver
19 here. I mean, he does what he wants to do and he is
20 satisfied that he's got what he wants, he can file his
21 motion to file arbitration; but I can't go depose the people
22 that supposedly presented and explained these arbitration
23 agreements to them, because when I styled my notice of
24 deposition, they can file a motion to compel arbitration,
25 and everything stops. It's unfair. They want to avail

1 themselves of this Court when it suits them. They want to
2 run us through the mill and put our family through it, as
3 long as it suits them, but the moment things start getting a
4 little bit risky, a little bit hairy, bam, we're going to
5 file our motion to compel arbitration. It's almost like
6 they have this ace up their sleeves.

7 And this is what waiver is about, Your Honor, to say
8 no, if you wrote this, you wrote this way back before -- I
9 mean, I could get into all the merits of why this thing is
10 wrong, but you wrote this years ago, you're still using it,
11 and it's wrong. But now they want to say we're going to
12 wait, get the discovery we want that we may not be able to
13 get through arbitration to prove our case and then stop you
14 from doing the same thing. They can't do that. They should
15 not be allowed to do that, Your Honor. It's unfair. That's
16 what waiver is for. We would ask that they not be allowed
17 to do it. And they're going to appeal either way, Your
18 Honor. That's what we talked about before. He said, "You
19 know, we're going to appeal this." I said, "Well, if you
20 file a motion to compel today and we argue it tomorrow,
21 you're going to appeal that, too." This is going up, and
22 that's unfortunate, but it's unavoidable, as far as I can
23 tell. They've lost on this arbitration -- I can hand you
24 up, Your Honor, right now a stack of orders from across the
25 state where judges have found this arbitration agreement to

1 be invalid.

2 There was a case, Grant v. Magnolia Manor Care, or
3 something like that, that went up to the Supreme Court a
4 couple of years ago that said that one of the exact same
5 provisions that these arbitration agreements were not a
6 meeting of the minds, violated contract law, and threw it
7 out. That's what's going to happen, but I can't avoid that.
8 But if the Court can look at this and say, "You can't do
9 this, Pruitt." You can't say I'm going to avail myself to
10 the Court while it suits me and jump out when it doesn't.
11 Then, I think if we're going to have to get an appellate
12 court ruling, I'm ready; let's go. Either way, they're
13 dragging our clients through the mud on it and I don't think
14 it's fair.

15 MR. RISSLER: Judge, there are a few things I'd like to
16 clarify here. I have never suggested that Lee cannot take
17 depositions or get discovery on the arbitration issues. I'm
18 not trying to stop him from getting what he needs to defend
19 against the arbitration. If he knows he needs it ---

20 THE COURT: But it's still somewhat limited, you would
21 agree to that. I mean, the whole idea behind arbitration is
22 quick resolution and for reduction in money, as far as
23 filing fee's go.

24 MR. RISSLER: That's correct. And as our discovery is
25 limited. He's saying that we're trying to avail ourselves

1 to the Court to get discovery on the merits. We haven't
2 sent any discovery on the merits of their underlying claim.
3 The only discovery we've sent, and purposely to limit it, so
4 that we didn't waive the claim, the only discovery we've
5 sent was on the issue of arbitration, and only because they
6 haven't complied with the arbitration agreement. This
7 discovery can be done fairly quickly. We can get this
8 motion to compel filed so that it's in a procedural posture
9 so that they can respond. If they need to take discovery to
10 do that, that's fine. We're not suggesting that they can't.
11 We're not suggesting that they not be allowed and that they
12 be put at a disadvantage to respond to the motion to compel
13 arbitration. Nobody has suggested that. All we're asking
14 for is that we give out reasonable discovery on the
15 arbitration issues and then we can present it to the Court
16 so that we will be in a position to address the merits of
17 the arbitration agreement.

18 THE COURT: Okay.

19 MR. COPE: I can't control what they do. They can
20 leave right now and file a motion to compel arbitration and
21 all discovery stops. I appreciate Mr. Rissler standing up
22 and saying that, but he's not the client. His client makes
23 those decisions. They are very schooled in the ways of
24 nursing home litigation, and we can't be certain of that.
25 But what we are saying is let's keep using the court system.

1 We're going to use the South Carolina Rules of Civil
2 Procedure to send you requests for admission to get you
3 bound to stuff that we'll use against you later in the
4 arbitration procedure. Whereas, if we didn't do that, if he
5 didn't avail himself of the South Carolina Rules of Civil
6 Procedure, there is a whole different forum, according to
7 them, that we're supposed to go through, and they haven't
8 chosen that; they could. There's nothing stopping them.

9 They claim they have two valid arbitration agreements.
10 Why not file a motion to compel arbitration now? Why not
11 instead of filing an answer to my summons and complaint in
12 both of these cases, file a motion to compel arbitration if
13 these are valid? Well, one of the concerns they've got in
14 the Jones' case, the person who signed the agreement wasn't
15 even a power of attorney in any sort; had no authority to
16 enter into a contract, but they didn't want to give -- they
17 sent us requests for admission on that case to get us to
18 admit that she was authorized to do it, so they could then
19 file their motion to compel arbitration and go on. So, Your
20 Honor, if they thought they had valid arbitration
21 agreements, they would have filed a motion to compel
22 arbitration. They want to use our rules of civil procedure
23 to build a case to keep arbitration, and that's not fair;
24 that's not what's envisioned by this so-called arbitration
25 law they want to rely upon.

1 MR. RISSLER: Do you want anything further, Your Honor?

2 THE COURT: If you want to respond to him.

3 MR. RISSLER: His suggesting that we're looking for
4 things in discovery that we're going to use in the
5 arbitration proceeding is just false. We're looking for
6 discovery that we can use when we meet for arbitration here.

7 THE COURT: How is that you not availing yourself to
8 the Court as opposed to arbitration? And it's giving you
9 the opportunity to do those depositions and you know,
10 forgive me, maybe I need to go look into the rules of
11 arbitration, but how limited is it and what can you do as
12 far as depositions?

13 MR. RISSLER: It's up to the individual arbitrator. If
14 they think that it's necessary, they can allow it; but
15 again, the suggestion that we're not allowed any discovery
16 to respond to their allegation in this Court that the
17 arbitration agreement isn't valid just doesn't make any
18 sense, and the suggestion that the fact that we've submitted
19 discovery is indicative that we don't believe the agreement
20 is valid. I mean, that would be like saying that the fact
21 that we've submitted discovery on the underlying claims
22 means that he thinks those claims aren't valid. It just
23 doesn't make any sense.

24 THE COURT: Why don't you just file the motion to
25 compel arbitration?

1 MR. RISSLER: Well, because he's going to raise these.
2 defenses of the authority of the people who signed it, of
3 the Triple A issue, and we need to know what defenses he's
4 going to raise and be able to investigate those defenses and
5 be able to respond to those defenses, not the underlying
6 claims. We're not seeking discovery on that. We're not
7 seeking -- and that's what waiver is about, seeking to avail
8 yourself of discovery that you wouldn't be able to get in
9 arbitration on underlying claims; not to go forward and
10 present your case on whether the arbitration agreement is
11 valid. I think the Court has a right to hear all the
12 evidence relating to the arbitration before it makes a
13 decision whether these agreements are enforceable or not.

14 THE COURT: I think part of why the Supreme Court, and
15 certainly public policy, is in favor of arbitration is
16 because it keeps the Court docket from being clogged, but
17 this isn't doing that in any way. This is using up until
18 you can prove your case and then go into arbitration. I
19 guess my bigger concern is would be the delay that it
20 causes.

21 Additionally, while you're entitled to your discovery
22 and we're spending money on something that has to do with
23 the underlying arbitration agreement and not what the
24 ultimate claim is. I'll have to think about this one. I'm
25 gonna have to tell you, honestly.

1 MR. COPE: Thank you, Your Honor.

2 MR. RISSLER: Thank you, Your Honor. Would post-
3 hearing briefs on the waiver issue assist or?

4 THE COURT: How about proposed orders? That would be
5 even better. You both can submit one.

6 MR. COPE: Thank you, Your Honor.

7 MR. RISSLER: Thank you, Judge.

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STATE OF SOUTH CAROLINA)
)
COUNTY OF COLLETON)

CERTIFICATE

I, REBECCA H. HILL, Official Court Reporter for the Judicial Department of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had in the hearing of the captioned case, in the Court of Common Pleas Non-Jury for Jasper County, South Carolina, on the 11th day of February 2011.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto

April 25, 2013

Rebecca H Hill
Rebecca H. Hill,
Official Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF HAMPTON) IN THE COURT OF COMMON PLEAS

3

4 LINDA JOHNSON, as personal)
5 representative of the)
6 Estate of Inez Roberts) No. 2010 CP 25 489; 490
7 Plaintiff)

8 versus)

9 HERITAGE HEALTHCARE OF)
10 ESTILL, LLC, doing busi-)
11 ness as Heritage of the)
12 Lowcountry and/or doing)
13 business as Uni-Health)
14 Post Acute Care of the)
15 Lowcountry, et al)

16 Defendants)

17 _____ TRANSCRIPT OF RECORD

18 CHERRY T. SCOTT, as personal)
19 representative of the)
20 Estate of Elizabeth Jones) No. 2010 CP 25 491; 492

21 Plaintiff)

22 versus)

23 Same Defendants)

24

25 _____ Hampton, South Carolina
October 7, 2011

26

27 B E F O R E :

28 HONORABLE CARMEN MULLEN, Judge

29

30 HARRIET P. BENNETT
31 Reporter, S. C. Court Administration
32 46 Regency Oaks Drive
33 Summerville, S. C. 29485

1 A P P E A R A N C E S:

2 For the Plaintiffs: LEE COPE, Esq.

3 For the Defendants: MICHAEL MONTGOMERY, Esq.

4 Reporter Present: DEBORAH EVERETT

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1 (The within matter came before the Court on October
2 7, 2011, in Hampton, South Carolina)

3 CLERK: Linda Johnson, 10 CP 25 489, 490, and Cherry
4 Scott is 10 491 and 492.

5 MR. MONTGOMERY: My name is Michael Montgomery. I
6 represent Heritage Healthcare in the cases that that are
7 pending in Hampton.

8 The first one is Cherry Scott as personal represent-
9 ative, and there may be a little difference between the
10 two in terms of who signed the admission documents and
11 arbitration agreement. I will address those separately,
12 but the arguments and defenses that have been raised I
13 think will apply equally, and Mr. Cope will correct me
14 if I'm wrong about that.

15 Your Honor, I would refer to Cherry Scott as PR
16 at this time. Back in April of 2007, Ms. Jones was ad-
17 mitted to Heritage Healthcare. Ms. Jenkins executed
18 the paperwork when she was admitted, and part of that is
19 an arbitration agreement that we have included as Ex-
20 hibit A to our memo.

21 There is no signature because she is unable to give
22 her signature. I think in the case there may be some
23 dispute over that but there was a power of attorney in
24 the Roberts case, where here there was no power of at-
25 torney.

1 Ms. Jenkins signed it -- Ms. Jenkins in her depo-
2 sition said I signed it. She said my family knew I was
3 signing it. Her sister knew she was signing it, and
4 there was no -- she said or everyone said that she dis-
5 cussed that she would execute the paperwork for the
6 admission.

7 The arbitration agreement itself -- I'd like to
8 point out the provision is under number two. It states
9 that any arbitration proceeding that takes place under
10 this arbitration shall follow the rules of the American
11 Arbitration Association, which is referred to as Triple
12 A.

13 I think at the outset of it, on its face, there is
14 no dispute that this claim related to medical care and
15 falls within the arbitration agreement.

16 It does not provide for the arbitration to be ad-
17 ministered by the Triple A, but simply it would follow
18 Triple A rule.

19 The proceeding is supposed to be conducted within
20 the county and located close to the facility, and it
21 even says with the selection of arbitrators we don't
22 submit it to Triple A in accordance with the rules. We
23 just follow their rules which they have set out, and I
24 think that is going to be an issue with this arbitra-
25 tion agreement.

1 We submit, Your Honor, that the Federal Arbitration
2 Act applies to this agreement as a contract evidencing
3 the transaction involving interstate commerce.

4 We will save that argument for a little bit later
5 and the defenses raised by Mr. Cope.

6 There is an acknowledgment in the agreement itself
7 that this affects interstate commerce, and we would rely
8 on the Allied Bruce Terminix versus Dobson that says an
9 arbitration agreement if it is executed in connection
10 with the transaction affects interstate commerce, re-
11 gardless of whether or not an interstate commerce trans-
12 action is contemplated.

13 So under the FAA in South Carolina case law there
14 is a strong perception that all doubt should be resolved
15 in favor of arbitration.

16 So at this point we are saying two relative inquir-
17 ies at this stage of the litigation on arbitration is
18 whether there was knowledge of the agreement and whether
19 the claims falls within the scope of the arbitration
20 agreement.

21 Here is where, I guess, we split between Ms. Scott
22 and Ms. Jones. The Jones case in which Ms. Jenkins
23 signed in behalf of the resident -- I think the claim
24 now is she wasn't authorized to act.

25 She was admitted -- there never has been any

1 repudiation of that. She has received the benefit of
2 the care there. There was never any indication by Ms.
3 Jones that she wasn't authorized to do so, to sign the
4 paperwork.

5 She cannot be admitting the benefit but then repu-
6 diate the part that she now finds disadvantageous.

7 I don't believe we have this in our brief -- I can
8 count four Orders in response to Plaintiff's admissions
9 yesterday. These are various Orders that touch on some
10 of these same issues.

11 The first one is the Wiggins Order, and that case
12 raises the same defense that's being raised here, the
13 exact same defense.

14 There is a family member that didn't have a power
15 of attorney that signed the admission and the arbitra-
16 tion agreement. In the Wiggins case, Judge Curry --
17 this is an Order that was filed less than a month ago,
18 September 13th -- she said that we've got third party
19 benefit-sharing principles here, equitable estoppel,
20 and Ms. Jenkins entered into this admission agreement
21 for the sole purpose of having health care for Ms. Jones,
22 and she is the third-party beneficiary and also equitably
23 estopped from now trying to refute part of the agree-
24 ment.

25 In the Roberts case, I don't believe that is really

1 an issue because there was a power of attorney. I do
2 not think there is any issue about it, and again as far
3 as whether the claims are covered within the arbitration
4 agreement we all agree that the health care are stand-
5 ard issues that are covered on its face by this agree-
6 ment, and our argument would be under the case law and
7 under the FAA the inquiry stops there.

8 If there are any defenses that were to be raised,
9 they would be raised at arbitration. So I don't -- if we
10 find a valid agreement -- I will continue because the de-
11 fenses have been raised in the first one which I think
12 has come up from time to time in these agreements that a
13 Triple A forum is no longer available.

14 That is the defense that has been raised, and what
15 happened is that Triple A issued a position statement
16 some years ago that said that due to a backlog of cases
17 or for whatever reason we are not going to administer
18 health care arbitration disputes unless there is a post-
19 injury agreement; that we are not going to open our
20 doors as a forum.

21 They are simply saying after -- there has got to
22 be some agreement to arbitrate after the dispute arises,
23 and that is distinguishable, again, from this arbitra-
24 tion agreement and the case cited by the Plaintiff, be-
25 cause the arbitration agreement does not have the

1 arbitration administered by Triple A. It simply says
2 shall follow the rules.

3 It is no different than if we go to arbitration
4 and agree on the Federal Rules of Civil Procedure.
5 There is no Federal Court procedure but that doesn't
6 mean we can't follow those rules.

7 The cases cited by the Plaintiff say those arbitra-
8 tion agreements call for various arbitrational positions
9 to administer it. They submit -- they will submit to
10 arbitration. In those cases the organizations have
11 either changed names or things like that.

12 Here Triple A still opens its doors to us. All
13 they've got to do is agree to it. I think that is part
14 of the logical fault in the Plaintiffs' arguments --
15 we can't submit to Triple A; we don't have a meeting of
16 the minds and the arbitration agreement is no good.

17 If we say to take the arbitration, they will do it.
18 Again, not called for in the contract. It is simply
19 the rules that will be followed.

20 I guess if you look at Grant versus Magnolia Manor,
21 a 2009 Supreme Court case that is cited by the Plaintiffs,
22 the proposed forum was no longer available so that is a
23 material part of the contract. Since that is not avail-
24 able, you know there was no meeting of the minds.

25 In Wiggins, the Order by Judge Curry, it sheds some

1 light on that as well.

2 I stand corrected -- it says administered. The
3 arbitration agreement -- a binding arbitration adminis-
4 tered by the National (portion not audible).

5 Judge Curry actually kind of distinguished that
6 case in Wiggins by saying that the entity simply changed.
7 It changed names. It didn't really change or shut its
8 doors either.

9 The same thing here. We don't have a case where
10 Triple A no longer hears or is disbanded or anything of
11 that nature. We just have to have a post-dispute agree-
12 ment.

13 The other Orders that I have are the Boland Order,
14 Harrison, Archie -- they kind of touch on this. They
15 say, as the Triple A form, that what's called for is the
16 rules; that you can't create an artificial obstacle to
17 an arbitration agreement, especially in light of our
18 policy that we're going to favor arbitration and resolve
19 with access not being recused.

20 I think that the other -- just to summarize, it.
21 only calls for the rules, not the forum. We are not
22 submitting it, but if we wanted to say it is the forum
23 that is now no longer available, they haven't shut their
24 doors. We can still agree to go. They haven't shut
25 their doors and it is not an integral part of the

1 contract that validates the whole thing.

2 Judge Curry touched on this in Wiggins.

3 Ms. Jenkins said she didn't read it, so how can she
4 rely upon it as an integral part of the Triple A provis-
5 ion if she didn't read it? Judge Curry touched on that
6 as well.

7 So there is also measures in the Arbitration Act
8 that would pick up and allow for a substitute arbitrator
9 if we even needed to go that far, which we submit that
10 we don't.

11 The second defense, Your Honor, is the Interstate
12 Commerce. Again, that's a threshold issue which we
13 discussed in our memo.

14 Tims versus Green is a Supreme Court case that
15 basically says in a similar case that did involve in-
16 terstate commerce -- it was not contemplated on the face
17 of the agreement that interstate commerce would be a plan.

18 Two years later we got Allied Bruce which was deal-
19 ing with a Supreme Court case from Alabama, and it re-
20 cognized across the country there was states that were
21 determining whether the FAA, the Federal Arbitration
22 Act, (portion of sentence inaudible).

23 Allied Bruce clarified here the same qualification
24 that is supposed to be applied to these arbitration agree-
25 ments, and it specifically guides or raises contemplation
10

1 that if it in fact touches commerce, whether or not the
2 parties acknowledge its own agreement, then the FAA ap-
3 plies.

4 I think not only is there been acknowledgment in
5 the arbitration agreement but -- if you look at the
6 facts of Allied Bruce you have a termite company that
7 was doing work on someone's house and the Court held
8 that there was multiple faith.

9 In this case, we have a nursing home where there
10 is food, medicine, supplies, beds and federally funded
11 payments, and I think, most importantly, a Georgia cor-
12 poration pursued as a named party.

13 Now, on the merits we have made certain defenses
14 but we're not talking about whether interstate commerce
15 is involved. We've got a Georgia corporation as a named
16 Defendant as well as payments that were made; as well we
17 have an Order of Judge Anderson in the Federal Court in
18 McCullum versus (inaudible), and also there are other
19 cases that I think we've named. Tow versus United
20 Healthcare.

21 So you look at the arbitration agreement, the com-
22 plaint, the surrounding circumstances to determine if
23 interstate commerce is affected in any way by the trans-
24 action.

25 Finally, Your Honor, and I believe you have heard

1 some of these waiver issues that can be raised to the
2 arbitrator.

3 I do want to go over the factual background for the
4 waiver argument.

5 This suit was filed October 13, 2010, and there
6 had been a notice of intent. There had been pre-suit
7 mediation where time had passed between -- time had
8 passed and by the time we filed our motion to compel
9 arbitration.

10 This is a contractual right of arbitration. It is
11 not implicated into a suit that is filed and notice is
12 not -- they haven't violated the contract and arbitration
13 agreement by filing a notice or mediating.

14 There is a policy that favors mediation and pre-
15 suit efforts; doesn't say any kind of waiver should be
16 held against us as far as the time limit.

17 And so in October the law suit was filed. Answer
18 was filed, and maybe a week later a motion was filed
19 to strike our Answer.

20 In our Answer we raised an arbitration defense, that
21 arbitration should be compelled. A week later a motion
22 to strike that defense was filed. I believe Your Honor
23 heard the motions several months later, and then in the
24 course of that time there was limited discovery where we
25 filed discovery solely limited to arbitration agreement

1 issues.

2 We deposed Ms. Jenkins and Ms. Scott. Ms. Jenkins'
3 deposition lasted twenty minutes. Ms. Scott's was ten
4 minutes.

5 It was on the record in depositions only limited
6 to arbitration. There had been no discovery in this
7 case on the merits.

8 We haven't deposed anybody on the merits. Our dis-
9 covery has all been limited to the arbitration agree-
10 ments. They've been fully aware of that defense from
11 the very beginning of this case. They in fact filed a
12 motion to strike that defense.

13 I don't think we are required to file another mo-
14 tion to compell, where they've got a motion to strike,
15 to see what basis they have to strike the defense.

16 The case law says to take it on a case by case ba-
17 sis, the factors -- they look at the length of time that
18 has passed, the extent of discovery and the actual pre-
19 judice that would result in compelling arbitration.

20 I think some of the assertions by Plaintiffs in
21 their brief would be that this case is not ready for
22 trial; we haven't done any discovery on our part, on
23 the merits.

24 They sent us discovery requests, and we answered
25 them. To say they are now going to try to hang us by

1 cooperating or attempting to cooperate -- there was a
2 motion to compel but now they're going to say, well,
3 you waived your right to arbitration.

4 That's been pretty much at the fore-front from the
5 beginning with our defense, the motion to strike and
6 limited depositions and discovery on that issue.

7 And so even when you look at the waiver issue, any
8 doubts are resolved in favor of arbitration.

9 I think the point also could be made that if we
10 came in at the very beginning and filed a motion to com-
11 pell arbitration, and I think this argument is raised
12 all the time.

13 We are allowed to do some discovery as to what
14 they knew about the agreement they signed and when it
15 was signed, and other things at issue in this case, and
16 the cases I would point out to you are cases on both
17 sides.

18 They are -- I think this is in Plaintiffs' briefs
19 -- Rich versus Waltz, where one year had passed since
20 filing of the suit. They took a deposition and limited
21 discovery had been exchanged. There were some motions
22 filed, and the Court said no prejudice; arbitration was
23 compelled. There was no waiver.

24 Toler's Cove versus Trident -- limited discovery
25 had been done.

1 Then the last one is General Equipment versus Keller-
2 Rigby. In that case, a month had passed and two motions,
3 I think, on the waiver issue. There is no actual preju-
4 dice because they know from the very beginning that we
5 understood the situation, and that motion was denied.

6 We did discovery on or limited to the arbitration
7 issue. I know we filed our motion in August, so it was
8 less than or approximately ten months from the date of
9 filing to our motion, even though that issue was being
10 partially litigated during that time as well.

11 So on the waiver issue, that is what we would re-
12 spond, and I guess those are the three main defenses in
13 common. I don't believe capacity is an issue or is the
14 radius issue.

15 In the Roberts case there may be a little bit of
16 difference in the waiver issue with regard to a dispute
17 that arose before the suit was filed, and we would say
18 that arguments -- the Complaint being filed is what
19 really would start any kind of time analysis.

20 THE COURT: Thank you. Mr. Cope?

21 MR. COPE: Lee Cope for the Plaintiff.

22 We set forth in our memorandum the distinction be-
23 tween choosing to use the Triple A. The rules are mis-
24 leading because the very rules that they say we have to
25 abide by clearly state, the Rule R-two, that when the

1 parties agree to arbitrate under these rules are when
2 they provide arbitration by the Triple A, so the rules
3 are selective.

4 By the form you are allowing Triple A to administer,
5 and that is important, Your Honor, because the adminis-
6 tration under the form of the Triple A -- they decided
7 it was unfair.

8 They decided -- the Triple A, that is -- that you
9 can have a pre-injury arbitration dispute, and they de-
10 cided that back in 2003. Pruitt versus Heritage Health-
11 care.

12 Even though they knew the rules they were supposed
13 to operate under takes you to the form, and the form is
14 saying you're not going to hear this unless you agree
15 to it.

16 It is simply an arbitration agreement after they
17 enter it. I think that is very significant because it
18 takes us into the Grant versus Magnolia analysis and
19 makes it an integral part of the agreement. We have ar-
20 gued that before.

21 I have cited a case here today from Judge Milling,
22 and it goes to Grant versus Magnolia, and we get the
23 only letter I've ever gotten from them, saying we're
24 going to voluntarily dismiss the appeal, and they did.

25 So that case was subsequently resolved, and that

1 was the impact it had at that time.

2 One of the things that was interesting in Judge
3 Milling's Order was -- and there is also language that
4 is not in our brief -- if you use these rules without
5 using the Triple A, that is a violation of the copyright
6 laws. (Small portion inaudible)

7 Under Grant versus Magnolia, the whole arbitration
8 agreement fails, and so we think that is fairly clear,
9 Your Honor.

10 But, furthermore, you can't look further than the
11 FAA in this case to find another arbitrator. Again, un-
12 der the Triple A rules, you have to use a Triple A
13 arbitrator from their selection of panels -- their se-
14 lection of arbitration panels.

15 You can't -- to go from the Triple A to the FAA
16 there has got to be interstate commerce, and that is
17 where that is clearly lacking.

18 We set forth in both the Roberts and Scott cases
19 that this is a South Carolina resident who entered into
20 a contract with a South Carolina corporation, an LLC.
21 Everything in there, if we take out the self-serving
22 statement, the parties stipulate there is interstate
23 commerce -- there is nothing interstate about it.

24 Furthermore, as this Court is aware, Your Honor,
25 because we have argued this before, typically the

1 Defendant shows up with an affidavit from somebody to
2 show here is what all the interstate commerce is. They
3 haven't done this. They want this Court to just assume
4 there was interstate commerce with no evidence or proof
5 whatsoever. They failed to do that.

6 The reason they failed to do it is because the
7 agreement itself does not involve interstate commerce.
8 To suggest that you can stipulate to it is similar to
9 something in my brief -- stipulate to Federal Court sub-
10 ject matter jurisdiction.

11 The parties can't just say we're going to say it's
12 there and then it's there.

13 In fact, Your Honor, I've got a case to hand up,
14 Coleman versus Mariner Healthcare. If there is inter-
15 state commerce there has to be some proof of it.

16 Again, we know that Triple A has none, and we
17 also know that we can't resort to that FAA as a life
18 force because there has been no evidence of interstate
19 commerce, as much as Defendants want it. That is still
20 the law.

21 In the Nunos case, it did not do that, nor Allied.

22 Now, we get, Your Honor, to whether or not there
23 was a waiver. This applies in both of the cases.

24 As our brief sets forth, the notice of intent re-
25 quirement specifically states that the parties can

1 arbitrate, they can choose to arbitrate, and avoid the
2 notice of intent process.

3 They didn't do it, so they went to the notice of
4 intent process under the South Carolina Rules or South
5 Carolina law in the Court system. That failed; filed a
6 Summons and Complaint and he's right. They raised as a
7 defense arbitration, and, as Your Honor will recall, we
8 argued immediately thereafter that they can't do that.

9 The Court kept suggesting, you can file arbitration.
10 Okay, I hear you, but we're not.

11 I kept saying if they wanted to arbitrate, they
12 could have filed for arbitration. We might, Your Honor,
13 but we're not doing it right now.

14 And so the Court, and rightfully so, I think, said,
15 Lee, I'm not going to grant your relief right now but
16 this can be brought back up later if they do decide to
17 file for arbitration.

18 So I served extensive discovery, and they didn't
19 move for arbitration. They didn't want to respond to it
20 so they gave some answers. I filed a motion to compell.
21 There was a hearing in this Courtroom.

22 I showed up but they didn't. We got them on the
23 phone, and I'm not saying Mr. Montgomery. He just got
24 brought in the case a week ago. I'm talking about the
25 lawyers from Atlanta.

1 They didn't show up so we had a lengthy telephone
2 hearing. and got an Order from Judge (inaudible). They
3 have produced over six thousand pages of discovery, and
4 we have not ignored the Rules of Civil Procedure and
5 prepared for trial because no one had moved for arbitra-
6 tion, to compell arbitration.

7 We hired experts. We've spent money reviewing the
8 documents, getting ready for trial, and then they decide
9 after a lengthy time has passed -- we would say fourteen
10 months -- that now we are tired of this Court system,
11 and so we will be looking for things you have to con-
12 sider and for arbitration.

13 They knew they could have moved for it if they be-
14 lieved the agreement was applicable, and they could have
15 avoided everything I've just described by simply moving
16 to compell arbitration. They didn't do it.

17 I think one thing we can look at is the only log-
18 ical conclusion at this unfair, unnecessary delay to
19 the parties which would apply in both of these cases.

20 Some other things, Your Honor, we set forth in our
21 brief. It is hard to point to Ms. Linda Johnson and Ms.
22 Ellen Jenkins and say, well, you didn't read the agree-
23 ment so you can't come and raise this, when the very
24 persons in the nursing home -- in this Jerry Scott the
25 person who goes over arbitration agreements, Ms.

1 -- she's the one who signs off on it, and she said she
2 didn't know what arbitration was. She didn't know what
3 it meant.

4 She thought if you didn't think you were getting
5 care in a timely fashion, that's what arbitration was,
6 so it is very, very unfair to come in in this late stage
7 of this litigation and cause this unfair prejudice and
8 time and expense, work that has been gone through, and
9 to try to rely on a document that says you have to use
10 Triple A when Triple A won't let you do it and the per-
11 son who is supposed to provide Plaintiffs guidance does
12 not even know what it is. She candidly admitted, I
13 don't even know what it is. I don't know what it is.

14 There is nothing fair about what they are trying
15 to do.

16 Clearly, Ms. Johnson in the Inez Roberts case and
17 the PR in the Cherry Scott case -- clearly Ms. Johnson
18 was the POA for her momma, and Ellen Jenkins was not --
19 she was not the POA for her sister, Ms. Jones.

20 In fact, as we put into the documents, Ms. Jones,
21 according to the admission, was alert and oriented; was
22 capable of making her own decisions and didn't care to
23 sign off on it.

24 So we believe that the motion to compell arbitra-
25 tion should be denied in both of these cases.

1 One, because the form is not available and is therefore,
2 we believe, not an integral part of the agreement, and
3 even if it were they waited too long and have unfairly
4 prejudiced the Plaintiffs by waiting to file their mo-
5 tions.

6 Thank you, Your Honor.

7 THE COURT: All right.

8 MR. MONTGOMERY: I think, focusing on the Timms
9 case, when you ^{only} look at the agreement it doesn't do jus-
10 tice to the Supreme Court's pronouncement on the federal
11 -- the interpretation of the Federal Arbitration Act.

12 I think he pointed again at the Georgia Defendant
13 who has been sued. I think that clearly is evidence
14 that there is interstate commerce at play here, and then
15 on the prejudice I think the only thing I'd like to re-
16 spond to is the only depositions that have been taken
17 have been limited on arbitration issues, and especially
18 in the Jones case.

19 I don't think there was thirty minutes worth of
20 testimony on that, and there has been -- there has
21 been nothing that the Defendant has done which is incon-
22 sistent with the right to invoke arbitration.

23 The fact that he's served discovery and we have
24 tried to cooperate -- he has known from the beginning
25 that we have raised this issue.

1 There has never been anything where we have aban-
2 doned arbitration or done anything like that as far as
3 arbitration.

4 An expert was needed before the suit was brought,
5 and there were experts hired because we acted like we
6 weren't going to try and arbitrate the case.

7 That's our response to the prejudice issue.

8 THE COURT: Is Heritage (portion inaudible)

9 MR. MONTGOMERY: It's an LLC.

10 THE COURT: A South Carolina domestic corporation?

11 MR. MONTGOMERY: That's correct.

12 THE COURT: Is Uni-Health or United Clinical?

13 MR. MONTGOMERY: No. I didn't mention that earlier

14 .

15 THE COURT: Or United Rehab?

16 MR. MONTGOMERY: Briefly, I would say that there is
17 no contract with them to arbitrate.

18 THE COURT: The sentinel rule, is there a contract?

19 (Portion not audible)

20 MR. COPE: We would argue that the arbitration it-
21 self limits itself to residents of Heritage Healthcare
22 and the resident. There is no contract so we would argue
23 that you cannot rely on that.

24 Again, they have said we don't have anything to do
25 with the local facility.

1 MR. MONTGOMERY: They said the two Georgia corpor-
2 ations have nothing to do with the facility. It's just
3 Heritage Healthcare. That was something I failed to men-
4 tion.

5 That argument was rejected by Judge Curry.

6 THE COURT: I'm going to go ahead and read Judge
7 Curry's Order, and I would request proposed Orders.

8 -----END OF REQUESTED TRANSCRIPT-----

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1 CERTIFICATE

2 I, HARRIET P. BENNETT, Official Court Reporter for
3 South Carolina Court Administration, hereby certify that
4 the foregoing Transcript was prepared from the records
5 of Deborah Everett to the best of my ability, having
6 been heard in the Court of Common Pleas for Hampton
7 County, South Carolina, on October 7, 2011.

8 FURTHER, I certify that I am neither of kin nor
9 counsel to any party to this action, nor do I have any
10 interest in the same.

11 February 8, 2013

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Cherry Scott -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

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Page 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS
CASE NO.: 2010-CP-25-4896490

COUNTY OF HAMPTON

Cherry Scott as Personal
Representative of the Estate
of Elizabeth Jones,

PLAINTIFF,

DEPOSITION

OF

VS.

Cherry Scott

Heritage Healthcare of the
Estill, LLC, d/b/a Heritage of
the Lowcountry and/or d/b/a
Uni-Health East Acute Care of
the Lowcountry, United
Clinical Services, Inc.,
United Rehab, Inc., and Uni-
Profit Corporation,

DEFENDANT.

Deposition of Cherry Scott, taken before
Christina L. Richardson, a Notary Public in and for the
State of South Carolina, commencing at the hour of 1:30
p.m., May 5, 2011, at the office of Peters, Murdaugh,
Parker, Eltzroth & Detrick, P.A., 101 Mulberry Street East,
Hampton, South Carolina.

REPORTED BY
CHRISTINA L. RICHARDSON

INDEX OF EXAMINATION

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DIRECT EXAMINATION BY MR. RISSLER.....6
CERTIFICATIONS.....13

INDEX OF EXHIBITS

NO EXHIBITS WERE MARKED FOR THIS DEPOSITION.

*DIGITALLY RECORDED AUDIO RETAINED FOR TWELVE (12) MONTHS
FROM DATE OF CERTIFICATION.

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Page 4

FOR THE PLAINTIFF

APPEARANCES

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REPORTED BY

Christina L. Richardson
Co-Star Reporting
102 Waters Edge Road
Hampton, South Carolina 29924

STIPULATIONS

It is stipulated by and between counsel for
the respective parties that all objections are reserved
until the time of trial, except as to the form of the
questions.

This deposition is being taken pursuant to
the South Carolina Rules of Civil Procedure.

The reading and signing of this deposition is
WAIVED by the deponent and counsel for the respective
parties.

MR. COPE: First to the record, we have
agreed that the Defendants can take Ms. Scott's
deposition for the limited purpose of distressing
issues related solely to the Arbitration
Agreement. There won't be any questions outside
of that area. I don't anticipate it's going to
take a very long period of time. And what we'll
do as we did in the deposition in the other case
earlier today, I'll let you know if I think it's
getting outside of that and we're just going to
make sure that everybody is protected in that
regard.

MR. RISSLER: That's agreeable.

MR. COPE: And that assuming we stay within

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ROA-627

Cherry Scott -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

2 (Pages 5 to 8)

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1 just the arbitration issues I will not raise any
2 issue. If y'all file a Motion to Compel
3 Arbitration and then you win it, if you want to --
4 I mean and lose it and want to come back and take
5 her deposition I won't say that you've already
6 taken, so.
7 MR. RISSLER: Okay.
8 MR. COPE: All right.
9 MR. RISSLER: All right. And just let me
10 know if I get -- stray away from arbitration.
11 MR. COPE: You know, I don't like to do that
12 kind of stuff, but I will --
13 MR. RISSLER: All right.
14 MR. COPE: -- if you want me to.
15 MR. RISSLER: I learned that last time.
16 MR. COPE: I'm usually kind of quiet and sink
17 back into the background, so.
18 MR. RISSLER: All right. And I think this
19 one will be fairly short.
20 MR. COPE: Okay.
21 WHEREUPON, Cherry Scott, being duly
22 sworn and cautioned to speak the truth, the whole
23 truth, and nothing but the truth, testified and
24 deposed as follows:
25

1 MR. COPE: Clip that on your shirt, Ms.
2 Cherry.
3 THE COURT REPORTER: [Clips microphone onto
4 Ms. Cherry's shirt.] Sorry, Mr. Rissler.
5 MR. RISSLER: That's okay.
6 Q If you would continue to give verbal responses, as
7 opposed to nodding your head or something that's
8 difficult for the court reporter to take down.
9 A Okay. All right.
10 Q And I'll do my best not to -- to let you finish your
11 answer, and I would ask that you allow me to finish my
12 question before you begin your answer, and that way
13 we're not talking over each other; it makes it easier
14 for the court reporter.
15 A Okay.
16 Q Okay. Did you do anything to prepare for your
17 deposition today?
18 A No.
19 Q Okay. Did you meet with anyone?
20 A No.
21 Q Okay. Did you discuss any documents with anyone?
22 A I talked to Lee for a few minutes; that's all.
23 Q Okay. And I don't want to know what you talked to Lee
24 about, but --
25 A Oh, okay. Yeah.

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1 DIRECT EXAMINATION
2 BY MR. RISSLER:
3 Q Ms. Scott, my name is Jerad Rissler and I represent
4 Heritage Healthcare of Estill, LLC, the nursing home
5 where Elizabeth Jones resided as well as other
6 Defendants who've been named in your lawsuit: United
7 Clinical, United Rehab and UHS-Fruit Corporation. I
8 am going to be taking your deposition today, which
9 means I'm going to be asking you some questions and
10 getting your answers. I'm going to do the best I can
11 to ask the questions as clearly as I can. If for some
12 reason I mess up and I don't ask a good question, you
13 let me know that and I will fix the question for you.
14 Is that fair?
15 A Okay.
16 Q All right. And you understand that you're under oath
17 today?
18 A Yes.
19 Q All right. And it's the same oath that you would be
20 under if you were testifying in court?
21 A Okay.
22 Q And you're doing a good job of giving me verbal answers
23 because, as you can see, we've got a court reporter
24 here who's going to be taking down your responses, so
25 if you'd continue to --

1 Q -- I don't want to get into attorney/client privilege.
2 Did you discuss your deposition testimony with anybody
3 other than your counsel?
4 A No.
5 Q All right. And I understand that you are the sister --
6 A Yes.
7 Q -- of Elizabeth Jones?
8 A Yes.
9 Q Okay. And I understand that Ellen Jenkins is also your
10 sister?
11 A Yes.
12 Q And it's Ms. Jenkins who -- who signed Ms. Jones into
13 the nursing home?
14 A Yes.
15 Q Okay. Were you involved at all in the signing of the
16 documents or the meeting where your sister was admitted
17 to Heritage of Estill?
18 A No. We all told her, you know, go ahead and sign the
19 paper.
20 Q Okay. Were you there when she signed the paper?
21 A No, I wasn't there.
22 Q Okay. All right. Do you remember when Ms. Jenkins
23 admitted your sister, Ms. Jones, to Heritage of Estill?
24 A I couldn't remember what month it was, no, I couldn't.
25 Q Okay. You can't remember which month?

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ROA-628

Cherry Scott -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

3 (Pages 9 to 12)

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1 A No.
2 Q Okay. Did you have any discussions with Ms. Jones
3 before -- about being admitted to Heritage of Estill
4 before she was admitted there?
5 A Yes.
6 Q Okay. And what were those discussions?
7 A We told her she was going in for a little while for her
8 to get therapy.
9 Q Was she coming to Heritage of Estill from a hospital or
10 from home or...?
11 A From the hospital.
12 Q Okay. And did Ms. Jones understand that Ellen Jenkins
13 was going to be signing her into the nursing home?
14 A Oh, yes.
15 Q All right. And she agreed that Ellen Jenkins could
16 sign her into the nursing home?
17 A Yes.
18 Q All right. Were there any other discussions with Ms.
19 Jones about her admission to Heritage of Estill?
20 A No. She was thinking it wouldn't be long. No.
21 Q Okay.
22 A Yeah.
23 Q All right. But -- and Ms. Jones understood that --
24 that Ms. Jenkins was going to be handling the admission
25 for her?

1 specifier about signing Ms. Jones into the nursing
2 home?
3 A Yeah, I remember when she signed the papers she told
4 me, yeah.
5 Q Okay. She told you that she signed the papers?
6 A Yeah. Uh-huh (affirmative).
7 Q Okay. Did she tell you anything else about the --
8 about signing the papers?
9 A No. She said she wouldn't be in there long, but she
10 got to get therapy.
11 Q Uh-huh (affirmative).
12 A And after that that she could come back home.
13 Q Okay. All right. Did -- was there any mention to you
14 about an Arbitration Agreement?
15 A No it wasn't.
16 MR. KISSLER: Those are all the questions
17 I've got for you. Thank you very much for your
18 time.
19 THE DEPENDENT: You're welcome.
20
21 WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE
22 DEPOSITION IS CONCLUDED AT 1:31 p.m.
23
24 THE DEPENDENT WAIVED THE READING
25 AND SIGNING OF THE DEPOSITION.

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1 A Yes.
2 Q And did Ms. Jones put any limitations on Ms. Jenkins
3 handling that admission for her?
4 A Say that again now.
5 Q Are you of any -- I'm sorry, I stumbled over my own
6 tongue. Are you aware of any limitations that Ms.
7 Jones put on Ms. Jenkins in terms of admitting her to
8 the nursing home?
9 A The only thing she told her, "You won't be in there
10 long," yeah.
11 Q Okay. And I believe you said that you were not -- you
12 did not sit in on the meeting where Ms. Jenkins signed
13 Ms. Jones into the nursing home?
14 A No, I wasn't there then.
15 Q Okay. Did you talk with Ms. Jenkins at all about --
16 about that meeting?
17 A Oh, yeah, she told her what she did, yeah, because we
18 told her to go ahead and sign the paper.
19 Q Okay. And what did she tell you about -- did she tell
20 you who she met with to sign the paperwork?
21 A She did, but I can't remember the lady's name who she
22 talked to.
23 Q Okay. Did she tell you what -- what they talked about?
24 A I can't remember what she said.
25 Q Okay. Do you remember her telling you any of the

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2 (*This transcript may contain quoted material.
3 Such material is reproduced as read or quoted by the
4 speaker.)
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Cherry Scott -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

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STATE OF SOUTH CAROLINA

CERTIFICATE

COUNTY OF HAMPTON

Be it known that I took the foregoing deposition of Cherry Scott:

That I was then and there a Notary Public in and for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to administer an oath;

That the witness was by me first duly sworn or affirmed to testify the truth, the whole truth, and nothing but the truth, concerning the matter in controversy aforesaid;

The foregoing transcript represents a true, accurate and complete transcript of the testimony given by said deponent after first being duly sworn, at the time and place aforesaid, to the best of my skill and ability; said deposition was reported by method of Stenomask utilizing speech recognition with digital backup. This transcript may contain quoted material; said material is transcribed as read or quoted by the speaker.

I further certify that I am neither employed by nor related to any of the parties in this matter nor their counsel; nor do I have any interest, financial or otherwise, in the outcome of this action.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 25th day of June, 2011.

Christina L. Richardson
Professional Court Reporter

Notary In and For the State of South Carolina
My Commission Expires: May 26, 2015

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Transcript of:
Sally Dobson

Date: May 5, 2011

Case: Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

Case No.: 2010-25-CP-491 & 492

Name of Court Reporter: Christina L. Richardson
Notary Public for South Carolina

Sally Dobson -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS) CASE NO.: 2010-CP-25-491&492 COUNTY OF HAMPTON)) Cherry Scott as Personal) Representative of the Estate) of Elizabeth Jones,)) VIDEO DEPOSITION PLAINTIFF,)) OF VS.)) Sally Dobson Heritage Healthcare of the) Estill, LLC, d/b/a Heritage of) the Lowcountry and/or d/b/a) Uni-Health Post Acute Care of) the Lowcountry, United) Clinical Services, Inc.,) United Rehab, Inc., and UHS-) Pruitt Corporation,)) DEFENDANTS.)) Video deposition of Sally Dobson, taken before Christina L. Richardson, a Notary Public in and for the State of South Carolina, commencing at the hour of 2:10 p.m., May 5, 2011, at the office of Peters, Murdaugh, Parker, Fitzroth & Detrick, P.A., 101 Mulberry Street East, Hampton, South Carolina. REPORTED BY CHRISTINA L. RICHARDSON	1 INDEX OF EXAMINATION 2 STIPULATIONS.....4 3 DIRECT EXAMINATION BY MR. COPE.....5 4 CERTIFICATE.....20 5 6 INDEX OF EXHIBITS 7 8 A Resident and Facility Arbitration Agreement 9 Elizabeth Jones, signed by Ellen Jenkins.....17 10 11 12 13 14 15 16 17 18 19 20 21 *DIGITALLY RECORDED AUDIO RETAINED FOR TWELVE (12) MONTHS 22 FROM DATE OF CERTIFICATION. 23 24 25
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1 APPEARANCES 2 FOR THE PLAINTIFF 3 Lee D. Cope, Esq. 4 Peters, Murdaugh, Fitzroth, & Detrick, P.A. 5 Post Office Box 457 6 101 Mulberry Street East 7 Hampton, South Carolina 29924 8 9 Charles J. McCutchen, Esq. 10 Lanier & Burroughs, LLC 11 Post Office Drawer 2789 12 Orangeburg, South Carolina 29116 13 14 FOR THE DEFENDANT 15 W. Jerad Rissler, Esq. 16 Amall, Golden, Gregory, LLP 17 171 17th Street, NW 18 Suite 2100 19 Atlanta, Georgia 30363-1031 20 21 REPORTED & VIDHOTAPED BY 22 Christina L. Richardson 23 Co-Star Reporting 24 102 Waters Edge Road 25 Hampton, South Carolina 29924	1 STIPULATIONS 2 It is stipulated by and between counsel for 3 the respective parties that all objections are reserved 4 until the time of trial, except as to the form of the 5 questions. 6 This deposition is being taken pursuant to 7 the South Carolina Rules of Civil Procedure. 8 9 The reading and signing of this deposition is 10 WAIVED by the deponent and counsel for the respective 11 parties. 12 MR. COPE: Okay. We've agreed to take Ms. 13 Sally Dobson's deposition for the limited purposes 14 of her involvement with the admission and 15 arbitration issues in the Cherry Scott case. By 16 taking her deposition today we're not waiving our 17 rights should we be allowed to proceed with 18 litigation or if the Defendant does not move to 19 compel arbitration that we would be allowed to 20 take her deposition again if necessary on the 21 merits of the case. 22 MR. RISSLER: We agree. 23 THE VIDEOGRAPHER: Going on the video record 24 now. 25

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1 WHEREUPON, Sally Dobson, being duly sworn and 2 cautioned to speak the truth, the whole truth, and 3 nothing but the truth, testified and deposed as 4 follows: 5 DIRECT EXAMINATION 6 BY MR. COPE: 7 Q Would you state your full name for the record, please? 8 A Sally Stanley Dobson. 9 Q And your address? 10 A 300 West Elm Street, Hampton, South Carolina. 11 Q And you are employed by the -- by the nursing home in 12 Estill. What's the name of your employer? 13 A Uni-Health Post Acute Care of the Low Country. 14 Q Okay. I want to ask you some questions today about 15 part of your job duties and responsibilities as I 16 understand that that is with the admission process? 17 A Uh-huh (affirmative). 18 Q Are you involved in that? 19 A I am. 20 Q Tell me about your level of involvement with the 21 admission process of a new resident. 22 A I am the admissions director. I take referrals from 23 the hospital or from home. We go over them, we check 24 the pay sources, and then if we can help these people 25 or can admit them for care then we do the process of	1 MR. COPE: I wasn't trying. 2 Q But would you let me admit Mr. Rissler into a nursing 3 home? 4 A Can y'all admit me? 5 Q But do you understand my question, Ms. Dobson? 6 A Uh-huh (affirmative). Yes, I do. 7 Q Do you even take that into consideration or is it just 8 you deal with the family members that are present? 9 A I deal with the family members that are present and 10 have been taking care of this -- the parent or the 11 sister or brother. 12 Q Okay. Do you require that they provide you with a copy 13 of a Power of Attorney? 14 A If they have a copy of the Power of Attorney we ask 15 that we get a copy of it. 16 Q Okay. Tell me how you explain the documents to them. 17 A I go sheet by sheet and tell them what they are about 18 to sign. If they refuse to sign it, I mark through it 19 and put "refused to sign," I initial it and then have 20 them initial it. 21 Q So if they don't understand something you explain it to 22 them? 23 A Yes. 24 Q In detail? 25 A Yes.
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1 admitting them. 2 Q Okay. What is your involvement in the actual admission 3 process itself? 4 A I sign -- I have the paperwork signed by either the 5 patient or a family member. 6 Q Okay. Are you familiar with what family members can 7 enter into contract agreements for the resident? 8 A Most of the family members that I have come in contact 9 with who have been taken care of, like the mother or 10 the father, is a daughter, son, sometimes a sister, a 11 brother. 12 Q Are you aware of whether or not someone that does not 13 have a Power of Attorney has the legal ability to enter 14 into a contract for somebody else? 15 MR. RISSLER: Object to the form. 16 Q Do you understand my question? 17 A No. 18 Q If -- are you aware of any legal requirements that must 19 be met, for example, for me to admit Mr. Rissler into a 20 nursing home? 21 A No. 22 Q Okay. 23 MR. RISSLER: Object to the form. And object 24 to you trying to have me admitted. 25 THE DEPONENT: [Laughs.]	1 Q Because they have to make an informed consent before it 2 can be binding, right? 3 A Correct. 4 Q Okay. What is an Arbitration Agreement? 5 A It is an agreement that if they have any concerns or 6 complaints, that are not being taken care of in a 7 timely manner, they have the right to an arbitration. 8 Q Okay. 9 A When they sign the Arbitration Agreement that waivers 10 their right to a jury trial or, you know, having it in 11 court. 12 Q Okay. 13 A They are informed of this whenever they are there to 14 sign. 15 Q How does the arbitration -- tell me how an arbitration 16 occurs? Because I assume they want to know that. I 17 mean, what is an arbitration? 18 A Most of them don't want to know it. 19 Q Well, what is it? 20 A I mean they -- they just -- they either say, "I don't 21 understand what you're talking about," and then we read 22 over the Arbitration Agreement. And then if they want 23 to sign it and agree to sign, they will sign it. 24 Q Well, because you said that it's got to a knowing, an 25 understanding, I assume you understand what's --

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1 A Uh-huh (affirmative). 2 Q -- an Arbitration Agreement don't you? 3 A Uh-huh (affirmative). 4 Q Is that a "yes"? 5 A Yes, sir. I'm -- 6 Q Okay. 7 A -- sorry. 8 Q So tell me how an arbitration proceeding occurs. 9 MR. RISSLER: Object to the form. 10 Q Since that's what you're -- you're giving up your jury 11 trial in lieu of an arbitration proceeding. I assume 12 you have to understand what that is before you can 13 expect a person signing to understand it, right? 14 A Correct. 15 Q So tell me, what is an arbitration proceeding? 16 A It's -- well, let's see. I really don't know how to 17 explain it to you. 18 Q Well, try as best you can. 19 A Okay. It is where -- 20 Q Well, let me ask you, because if you don't know how to 21 explain it, how do you explain it to -- 22 A Well, I read it -- 23 Q -- patient? 24 A -- to them. 25 Q I understand, but you've already told me there's some	1 Q -- is exactly what you tell them? 2 A Uh-huh (affirmative). 3 Q Is that a "yes"? 4 A Yes, sir. 5 Q Okay. Because you've already got the form filled out 6 for them, right? 7 A That's correct. 8 Q You put a little check next to where they have to sign? 9 A Yes. 10 Q Okay. And you don't read over the form every time to 11 them, do you? 12 A No, sir. 13 Q Have you ever told them about any limitations in the 14 Arbitration Agreement? 15 A Not to my knowledge, no, sir. 16 Q Well, have you ever told them about any issues with the 17 arbitration rules that would be applied -- 18 A No, sir. 19 Q -- under these agreements? 20 A No, sir. 21 Q Are you aware of any? 22 A No, sir. 23 Q Did you know, Ms. Dobson, that the Arbitration 24 Agreement that we're here about today contains a 25 provision that the American Arbitration Association
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1 things they don't -- they may not understand -- 2 A Uh-huh (affirmative). 3 Q -- right? 4 A Correct. 5 Q And so you would be the one that has to explain it to 6 them, right? 7 A Correct. I would -- 8 MR. RISSLER: Object to the form. 9 Q Yeah. 10 A I would get somebody else to explain it to them. 11 Q Who else explains it to them? 12 A I can get my administrator to explain it. 13 Q Has he ever explained to you what an arbitration 14 proceeding -- 15 A Yes. 16 Q -- entails? 17 A Yes, he has. 18 Q And what has he told you? 19 A Well, he just tells me that it is an agreement that if 20 they have any complaints or any concerns that are not 21 being taken care of in a timely manner then we can go 22 into arbitration. 23 Q So when you go over the form that's -- what you just 24 told me -- 25 A Uh-huh (affirmative).	1 rules have to be followed? Were you aware of that? 2 A If it's on that sheet of paper, Well, I don't know what 3 the Arbitration Agreements are. 4 Q Well, how is it if you don't know, how would a resident 5 know or their family member? 6 A I don't know. 7 Q Well, don't you think that's an important part of it? 8 A It is. 9 Q It's a material part of the contract? 10 A It is. 11 Q And but you don't know what it is? 12 A But I don't know what it is. 13 Q And so you can't expect a resident to know? 14 A That's -- 15 MR. RISSLER: Object to the form. 16 A -- correct. 17 Q Or their personal representative? 18 A Uh-huh (affirmative). 19 Q Right? 20 A Right. 21 Q Or power of attorney, right? 22 A Right. 23 Q Or their family member? 24 A Right. 25 Q Okay. Are you aware -- Well, do you know what the AAA

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1 is? 2 A No, I don't. 3 Q Okay. Do you know what the fee schedule is for the 4 American Arbitration Association when you use their 5 rules to arbitrate a dispute? 6 A No, I don't. 7 Q Are there certain matters between the nursing home and 8 the resident or their family member that may not fall 9 under the arbitration agreement? 10 A I don't know. 11 Q Well, doesn't the family need to know that when they 12 sign this? 13 A I would think so, yes, sir. 14 Q But you're not aware? 15 A I'm not aware. 16 Q And you're the only person that meets with them to go 17 over these documents, correct? 18 A Yes, sir. 19 Q You've been over the document for the admission of Ms. 20 Elizabeth Jones? 21 A Yes. 22 Q You looked at it prior to the deposition beginning 23 today, haven't you? 24 A Yes. 25 Q Did you see anything in there that you didn't	1 MR. RISSLER: Object to the form. 2 Q Right. 3 A I don't know. I -- I don't -- 4 Q Well, if that's -- if I'm right -- 5 A Okay, if you're right. 6 Q If I'm right that they took the position in January of 7 2003 that they would no longer recognize as 8 arbitrations before them an Arbitration Agreement that 9 was signed before the injury that gave rise to the 10 dispute, don't you think that residents and their 11 family members and power of attorney should be advised 12 of that? 13 MR. RISSLER: Object to the form. 14 A I don't know. 15 Q Wouldn't you have wanted to that before you had 16 somebody sign that? 17 A I would think so, yes, sir. 18 Q Don't you think the right to a jury trial is a 19 substantial right? 20 MR. RISSLER: Object to the form. 21 A I -- I don't agree jury trials. 22 Q And do you agree with the constitution that provides -- 23 A Oh, yes -- 24 Q -- for it? 25 A -- I do. But...
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1 understand in the Arbitration Agreement? 2 A I don't think so. 3 Q Okay. Has anyone ever told you that the American 4 Arbitration Association, which is -- which you'll see 5 in a moment, is a part of the Arbitration Agreement 6 that you signed off on. They initiated a policy in 7 January of 2003 that they would not recognize 8 Arbitration Agreements unless it was signed after an 9 injury giving rise to an arbitration dispute. 10 MR. RISSLER: Object to the form. 11 Q Were you aware of that? 12 A No, sir. 13 Q Do you think patient's should be aware of that -- 14 MR. RISSLER: Object to the form. 15 Q -- if they -- 16 A Yes, sir. 17 Q -- signed this? You do? 18 A (Nods head up and down in an affirmative response.) 19 Q But you weren't aware of that? 20 A I was not aware of that. 21 Q And so for every one you've ever had a patient or a 22 resident or a family sign, if it contained the American 23 Arbitration Association rule requirement, they should 24 know that that the American Arbitration Association 25 does not favor pre-dispute Arbitration Agreements?	1 Q Why don't you agree with jury trials, Ms. Dobson? 2 MR. RISSLER: Object to the form. 3 A Well, it's not always a -- I mean it's not all of the 4 time, you know, but I feel like that some things are -- 5 I don't know. I don't know. 6 Q Well, who would be the arbitrator if there was a 7 dispute between a resident and the nursing home? 8 A Who would be the arbitrator? 9 Q Yeah. 10 MR. RISSLER: Object to the form. 11 A Well, one would be assigned? 12 Q By who? 13 A I don't know. 14 Q Well, how are you advising people to sign this if you 15 don't even know how it's going to work out? 16 A I don't know. 17 Q It doesn't seem fair does it? 18 A Uh-huh (affirmative). 19 MR. RISSLER: Object to the form. 20 A No. 21 MR. COPE: Let's take a quick break. 22 THE DEPONENT: Okay. 23 MR. COPE: Okay. 24 (Whereupon, off the record at 2:22 p.m.; 25 back on the record at 2:23 p.m.)

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1 Q I want to hand you what has already been marked Exhibit 2 A to your deposition, which is an Arbitration 3 Agreement, and ask you if you recognize that document? 4 (Whereupon, Defendant's/Plaintiff's Exhibit 5 No. A was marked for identification.) 6 A Yes, I do. 7 Q And on page one of Exhibit A, is that your handwriting 8 where you wrote in Ellen Jenkins? 9 A Yes, it is. 10 Q And do you know whether or not Ms. Ellen Jenkins had 11 Power of Attorney over her sister? 12 A No, I do not. 13 Q How do you determine whether or not the resident has 14 the right state of mind to sign this herself? 15 A Repeat the question. 16 Q How do you determine whether or not the resident has 17 the mental capacity to enter into this contract them 18 self? 19 A We have a mini-mental state exam done, usually before a 20 patient is admitted to the nursing facility, and the 21 nursing staff at the hospitals usually do this, and if 22 they score below 20 or less then they do not have the 23 mental capacity to -- 24 Q Okay. 25 A -- sign documents.	1 2 THE DEPONENT WAIVED THE READING 3 AND SIGNING OF THE DEPOSITION. 4 5 (*This transcript may contain quoted material. 6 Such material is reproduced as read or quoted by the 7 speaker.) 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
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1 Q And do you know if that's the case with Ms. Elizabeth 2 Jones? 3 A I don't know. 4 Q Have you gone back and checked? 5 A No, I have not. 6 Q Okay. If she had the mental capacity would it have 7 been more appropriate for you to go to her? 8 A Yes -- 9 MR. RISSLER: Object -- 10 A -- sir. 11 MR. RISSLER: -- to the form. 12 Q Okay. 13 MR. COPE: Those are all the questions I have 14 Ms. Dobson. 15 THE DEPONENT: Yes, sir. 16 MR. COPE: Thank you. Yes, ma'am. Well, if 17 you want me to think about it, I'll see if I can 18 come up with some more. 19 THE DEPONENT: That's all right. 20 MR. COPE: Jerad? 21 MR. RISSLER: I got no questions. 22 MR. COPE: Okay. 23 24 WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE 25 DEPOSITION IS CONCLUDED AT 2:25 P.M.	1 STATE OF SOUTH CAROLINA) 2) CERTIFICATE 3 COUNTY OF HAMPTON) 4 Be it known that I took the foregoing video 5 deposition of Sally Dobson; 6 That I was then and there a Notary Public in and 7 for the State of South Carolina-At-Large; 8 That by virtue thereof I was duly authorized to 9 administer an oath; 10 That the witness was by me first duly sworn or 11 affirmed to testify the truth, the whole truth, and 12 nothing but the truth, concerning the matter in 13 controversy aforesaid; 14 The foregoing transcript represents a true, 15 accurate and complete transcript of the testimony given 16 by said deponent after first being duly sworn, at the 17 time and place aforesaid, to the best of my skill and 18 ability, said deposition was reported by method of 19 Stenomask utilizing speech recognition with digital 20 backup. This transcript may contain quoted material; 21 said material is transcribed as read or quoted by the 22 speaker. 23 I further certify that I am neither employed by 24 nor related to any of the parties in this matter nor 25 their counsel; nor do I have any interest, financial or otherwise, in the outcome of this action. IN WITNESS WHEREOF I have hereunto set my hand and seal this 27th day of June, 2010. Christina L. Richardson Professional Court Reporter Notary in and for the State of South Carolina My Commission Expires: May 26, 2015

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Ellen Jenkins -- May 5, 2011

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STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones,

PLAINTIFF,

VS.

Heritage Healthcare of the Estill, LLC, d/b/a Heritage of the Lowcountry and/or d/b/a Uni-Health West South Coast of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UNS-Pratt Corporation,

DEFENDANT:

IN THE COURT OF COMMON PLEAS
CASE NO. 13-2010-CP-25-4915-492

DEPOSITION

OF

Ellen Jenkins

Deposition of Ellen Jenkins, taken before Christina L. Richardson, a Notary Public in and for the State of South Carolina, commencing at the hour of 1:43 p.m., May 5, 2011, at the office of Peters, Murdaugh, Parker, Elitzroth & Detrick, P.A., 101 Mulberry Street East, Hampton, South Carolina.

REPORTED BY:
CHRISTINA L. RICHARDSON

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*DIGITALLY RECORDED AUDIO RETAINED FOR TWELVE (12) MONTHS FROM DATE OF CERTIFICATION.

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REPORTED BY

Christina L. Richardson
Co-Star Reporting
102 Waters Edge Road
Hampton, South Carolina 29924

STIPULATIONS
It is stipulated by and between counsel for the respective parties that all objections are reserved until the time of trial, except as to the form of the questions.
This deposition is being taken pursuant to the South Carolina Rules of Civil Procedure.
The reading and signing of this deposition is WAIVED by the deponent and counsel for the respective parties.
MR. COPE: By agreement of all the counsel, we're allowing the Defendants to take the deposition of Ms. Jenkins for the limited purpose of going over the Arbitration Agreement in this case. By doing so we are not going to hold -- should the Defendants file a Motion to Compel Arbitration and then lose that and we end up -- or stay in litigation, so long as their questions today are limited solely to the Arbitration Agreement issues we will not attempt to block them from retaking Ms. Jenkins' deposition about substantive matters at a later time.
WHEREUPON, Ellen Jenkins, being duly sworn and cautioned to speak the truth, the whole

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Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

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1 truth, and nothing but the truth, testified and
2 deposed as follows:
3 DIRECT EXAMINATION
4 BY MR. RISSLER:
5 Q Ms. Jenkins, my name is Jerad Rissler and I'm the
6 lawyer representing Heritage Healthcare of Estill, LLC,
7 which is the operator of the nursing home where your
8 sister, Elizabeth Jones, resided. I also represent the
9 other Defendants in this case: United Clinical, United
10 Rehab, and UHS-Paulk Corporation. I'm going to be
11 taking your deposition today, which means I'll be
12 asking questions in trying to get information from you
13 what you know about, in this case, limited to the
14 Arbitration Agreement. I'm going to do the best I can
15 to ask questions clearly. If I do a bad job of that
16 and there's a question that I ask that you don't
17 understand, would you let me know that so I can
18 rephrase it for you?
19 A Yes.
20 Q Okay. All right. And as you can see, the court
21 reporter is going to be taking down your testimony so
22 that we can read it later, and so she needs you to give
23 verbal responses instead of you nodding your head yes
24 or shaking your head no. If you can give a verbal
25 response that's going to help her out a lot.

1 today?
2 A Oh, did I talk any -- no.
3 Q Okay. Did you review any documents to prepare for your
4 deposition?
5 A Oh, yes.
6 Q What documents did you review?
7 A I'm not -- I'm not sure.
8 Q Okay. And can you tell me about your educational
9 history?
10 A Tenth grade.
11 Q Okay.
12 A I went as far as the tenth grade.
13 Q Okay. Did you have any schooling after the tenth
14 grade? Did you get your GED or any other schooling or
15 training?
16 A No.
17 Q Can you read and write?
18 A Yes.
19 Q All right. And you are the sister of Elizabeth Jones?
20 A Yes.
21 Q And I understand that Cherry Scott is also a sister of
22 Elizabeth Jones?
23 A Yes.
24 Q Okay. At the time Ms. Jones was admitted to Heritage
25 of Estill, did she have any other living siblings?

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1 A Yes.
2 Q Okay. All right. And I'm going to do my best not to
3 interrupt you if you're in the middle of your answer,
4 and I would ask that you let me finish my question
5 before you start your answer, and that way we're not
6 talking over each other and that also will make it
7 easier for the court reporter.
8 A Okay.
9 Q All right. And you understand that you're under oath
10 today?
11 A Yes.
12 Q Okay. And that's the same oath that you would be under
13 if you were testifying in court?
14 A Yes.
15 Q What did you do to prepare for your deposition today?
16 A How do you mean?
17 Q Did you meet with anyone to prepare for your
18 deposition?
19 A Well I'm here now.
20 Q Did --
21 A I mean...
22 Q Did you meet with anyone to prepare for your
23 deposition?
24 A But like I say, as in...?
25 Q Did you talk with anybody about -- about your testimony

1 A Oh, yes.
2 Q Okay. Can you give me their names?
3 A Levy Tyson, Carlene Jones, well Cherry Scott, and
4 myself, Ellen Jenkins.
5 Q Okay.
6 A That's five? How many did I give you?
7 Q You gave me yourself, Ms. Jenkins, a Tyson... I didn't
8 get the first name?
9 A Larcenia.
10 Q Okay. And then another Jones.
11 A Yes. That's five, with myself?
12 Q Yeah, I got five including --
13 A Myself.
14 Q -- Ms. Elizabeth Jones, okay. All right. And I
15 understand that you signed the paperwork to admit Ms.
16 Jones to Heritage of Estill?
17 A Yes.
18 Q Okay. Do you know where she was being admitted from?
19 In other words, from the hospital or from home?
20 A The hospital.
21 Q Had you discussed with Elizabeth Jones her admission to
22 Heritage of Estill?
23 A Yes.
24 Q And what did you discuss with her?
25 A To let her know that she was going to be there for a

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Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

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1 little while for therapy.
2 Q Okay. Did she understand that you were going to be
3 signing her in to Heritage of Estill?
4 A Only for that purpose, yes.
5 Q And when you say "only for that purpose," what -- what
6 do you mean by "that purpose"?
7 A When she was going in for therapy and I guess whenever
8 she they would have to prepare for her, but just in
9 for therapy she knew that part because it was good.
10 Q All right. And she understood that you were going to
11 be the one who signed her in for the admission to
12 Heritage of Estill?
13 MR. COPE: Object to the form.
14 A Yes.
15 Q All right. Did you discuss her admission to Heritage
16 of Estill with any other family members?
17 A Yes.
18 Q Okay. And who did you discuss it with?
19 A My sister.
20 Q Well, my sisters and brother.
21 Q Okay. And they understood that you were going to be
22 signing the paperwork to admit your sister to Heritage
23 of Estill?
24 A Yes.
25 MR. COPE: Note my objection before she

1 to her about the admission to Heritage of Estill?
2 A For -- yeah, to get --
3 Q Okay.
4 A -- her therapy, yes.
5 Q All right. Did you talk to her about that while she
6 was in the hospital?
7 A Oh, yes.
8 Q Okay. And while she was in the hospital she understood
9 that you were going to sign her into Heritage of
10 Estill?
11 A Oh, yes.
12 Q All right. And did she give you any instructions about
13 her admission to Heritage of Estill?
14 A Well I told her, you know, for her therapy, you know,
15 because she was doing good and then she went in there
16 for more therapy and my daughter -- well, I was working
17 and my daughter was in school, so it was just for a
18 little while.
19 Q Okay. And who did you meet with to get your mother or,
20 excuse me, your sister admitted to Heritage of Estill?
21 A I think the lady's name was Ms. Sally, I think.
22 Q Sally Dobson?
23 A That sounds like her name.
24 Q Okay. Did -- had you met her before the day that you
25 admitted Ms. Jones to Heritage of Estill?

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1 responded.
2 Q Did anyone object to you being the one to sign your
3 sister into Heritage of Estill?
4 MR. COPE: Object to the form.
5 A Because I don't understand that.
6 Q Okay. Did -- let me ask you first. Did Ms. Jones ever
7 tell you that she didn't want you to be the one to sign
8 her into Heritage of Estill?
9 MR. COPE: Object to the form.
10 A I don't -- I don't understand that part either.
11 Q Okay. Ms. Jones understood that you were going to be
12 the one to sign her into Heritage of Estill?
13 MR. COPE: Object to the form.
14 A Well, she understood that part.
15 Q Okay. Did she -- did Ms. Jones give you any
16 instructions about signing her into Heritage of Estill?
17 MR. COPE: Object to the form.
18 A How you mean?
19 Q Did she tell you either things that she wanted you to
20 do or things that she didn't want you to do about --
21 A Oh.
22 Q -- signing her into Heritage of Estill?
23 MR. COPE: Object to the form.
24 A I don't understand what you're say now since...
25 Q Okay. Did you -- I think you had said that you talked

1 A No.
2 Q That was the first time that you had met her?
3 A Yes.
4 Q When did you meet with her?
5 A I can't think back to the date.
6 Q Okay. In other words, did you meet with her before
7 your sister was admitted to Heritage of Estill or did
8 you meet with her on the same day or did you meet with
9 her sometime after?
10 A I'm not sure, because I know I met with her.
11 Q Okay. But you don't recall when it was in relation to
12 --
13 A I don't recall right now.
14 Q Okay. Do you recall anything about the admissions
15 process?
16 A Like -- Can you explain the date bit?
17 Q Okay. Did you have a meeting with Ms. Sally Dobson
18 about Ms. Jones' admission to Heritage of Estill?
19 A Oh, like did I talk to her?
20 Q Yes.
21 A When I go there, yes.
22 Q Okay. And was that in Ms. Dobson's office?
23 A Well it was in a office and I take it was there.
24 Q Okay, fair enough. Do you remember anything that you
25 talked about with Ms. Dobson about the admission?

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102 Waters Edge Road, Hampton, SC 29924 / (803) 943-7119

ROA-639

Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Estill, LLC, et al.

4 (Pages 13 to 16)

Page 13

1 A Just signing her in --
2 Q Okay.
3 A -- that I can remember.
4 Q Do you recall having any discussions about any of the
5 documents that you signed?
6 A The only thing I recall was me signing her in, that's
7 what I recall.
8 Q All right. Do you recall anything specific about what
9 you signed?
10 A Just signing her in, that was it.
11 Q Okay. Do you remember if you had any questions for Ms.
12 Dobson about any of the paperwork that you signed?
13 A It was, basically, simple. I just, you know, had to
14 sign her in and that was like, basically, it.
15 Q All right. Were you given a copy of all the documents
16 that you signed?
17 A I'm not sure.
18 Q Okay. And I'm going to ask the court reporter to hand
19 you the document that's marked as Exhibit 1. Actually,
20 I'll hand it to you.
21 (Whereupon, Defendant's Exhibit No. 1
22 was marked for identification.)
23 Q Do you recognize that document?
24 A No, sir.
25 Q Okay. If you'll turn to the second page of that for

Page 14

1 me.
2 A (Witness Complies.)
3 Q Is that your signature there close to the bottom of the
4 second page?
5 A Close to the bottom as in the second line?
6 Q The second -- yeah, the second line that has
7 handwriting on it. Is that your signature?
8 A That second line is my signature.
9 Q Okay. All right. Do you recall this document at all?
10 A Uh-unh (negative).
11 Q Okay.
12 A I don't recall seeing this, but that's my signature.
13 Q Okay. Do you recall, at the meeting that you had with
14 Ms. Dobson --
15 A Uh-huh (affirmative).
16 Q -- whether you discussed an Arbitration Agreement?
17 A I don't remember hearing that word at all. Uh-unh
18 (negative).
19 Q Do you recall if you read this document before you
20 signed it?
21 A I know it wasn't nothing but this here on it.
22 Arbitration Agreement, now I don't remember that at
23 all.
24 Q Okay. So you don't recall it?
25 A I don't remember that at all.

Page 15

1 Q Right. But on the second page that is your signature,
2 right?
3 A That's just my signature.
4 Q Okay. Just to make sure I'm clear, you don't recall
5 having any discussions with anybody about this document
6 at the time that you signed?
7 A No, sir.
8 MR. RISSLER: Those are all the questions
9 I've got.
10 CROSS-EXAMINATION
11 BY MR. COPE:
12 Q Ms. Jenkins, you were never appointed as the Power of
13 Attorney for your sister, were you?
14 A Never.
15 Q Never had the legal authority to sign documents on her
16 behalf?
17 MR. RISSLER: Object --
18 A I never did.
19 MR. RISSLER: -- to the form.
20 Q Okay. Thank you.
21 A Never did.
22 MR. RISSLER: Let me just follow up on that.
23
24
25

Page 16

1 REDIRECT EXAMINATION
2 BY MR. RISSLER:
3 Q At the time that you signed this Arbitration Agreement
4 do you know if any -- if Ms. Jones had given a Power of
5 Attorney to anyone else to act on her behalf?
6 A First of all, this is my signature, but this paper with
7 the last one, and I don't recall this at all.
8 Q Okay.
9 A But that is my signature.
10 MR. COPE: And you're referring to page one
11 of Exhibit 1?
12 THE DEPONENT: Yes.
13 MR. COPE: Okay.
14 THE DEPONENT: I didn't see that at all and
15 that's not my printing. I don't write like that.
16 Q Okay. As of this date, the date that Ms. Jones was
17 admitted to Heritage of Estill, do you know if anyone
18 held a Power of Attorney to act on her behalf?
19 A I don't know, no. I don't no.
20 Q All right.
21 RECROSS-EXAMINATION
22 BY MR. COPE:
23 Q And was she mentally okay? I mean, was she able to
24 think and recognize people and know who --
25 A Oh, yeah, she knew all that.

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102 Waters Edge Road, Hampton, SC 29924 / (803) 943-7119

ROA-640

Ellen Jenkins -- May 5, 2011

Cherry Scott as Personal Representative of the Estate of Elizabeth Jones v. Heritage Healthcare of Bstill, LLC, et al.

5 (Pages 17 to 19)

Page 17

- 1 Q Nothing wrong with her?
2 A Nothing been wrong with her.
3 Q Was she right-handed?
4 A Yes, she was.
5 Q Was she able to write?
6 A No, she wasn't able to write.
7 Q She had a shaky hand? You're shaking your right hand.
8 A Yeah, like that. [Demonstrates.]
9 Q But she was able to know what she wanted and what she
10 wanted to do?
11 A Uh-huh (affirmative), but she couldn't write.
12 Q She just couldn't sign her name?
13 A Uh-huh (negative).
14 Q Okay.
15 MR. COPE: That's all.
16 MR. RISSLER: One more follow-up.
17 REDIRECT EXAMINATION
18 BY MR. RISSLER:
19 Q Did you discuss -- after you signed into the nursing
20 home did you discuss with her any of the documents that
21 you had signed for her?
22 A Just saying that I was signing her in; that was it.
23 Q Okay. And she understood that you had signed her into
24 the nursing home?
25 A Yes.

Page 18

- 1 Q Okay.
2 MR. COPE: All right. That's it.
3
4
5 WHEREUPON, THERE BEING NO FURTHER QUESTIONS, THE
6 DEPOSITION IS CONCLUDED AT 2:01 P.M.
7
8 THE DEPONENT WAIVED THE READING
9 AND SIGNING OF THE DEPOSITION.
10
11 (*This transcript may contain quoted material.
12 Such material is reproduced as read or quoted by the
13 speaker.)
14
15
16
17
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21
22
23
24
25

Page 19

STATE OF SOUTH CAROLINA

COUNTY OF HAMPTON

CERTIFICATE

Be it known that I took the foregoing deposition
of Ellen Jenkins:

That I was then and there a Notary Public in and
for the State of South Carolina-At-Large;

That by virtue thereof I was duly authorized to
administer an oath;

That the witness was by me first duly sworn or
affirmed to testify the truth, the whole truth, and
nothing but the truth, concerning the matter in
controversy aforesaid;

The foregoing transcript represents a true,
accurate and complete transcript of the testimony given
by said deponent after first being duly sworn, at the
time and place aforesaid, to the best of my skill and
ability; said deposition was reported by method of
Stenomask utilizing speech recognition with digital
backing. This transcript may contain quoted material,
said material is transcribed as read or quoted by the
speaker.

I further certify that I am neither employed by
nor related to any of the parties in this matter nor
their counsel, nor do I have any interest, financial or
otherwise, in the outcome of this action.

IN WITNESS WHEREOF I have hereunto set my hand and
seal this 25th day of June, 2011.

Christina L. Richardson
Professional Court Reporter

Notary in and for the State of South Carolina
My Commission Expires: May 26, 2015

CO-STAR REPORTING

102 Waters Edge Road, Hampton, SC 29924 / (803) 943-7119

ROA-641

**Resident and Facility
Arbitration Agreement**
Please Read Carefully



It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or "Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.

1. **Claims.** For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. **Proceeding.** Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. **Awards.** The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such

damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

4. **Binding Effect.** The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.
5. **Applicable Law.** The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.
6. **Right to Consultation.** The Resident understands that the Resident has the right to consult an attorney of his or her choice about this Arbitration Agreement and to receive an explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature

Date

Elizabeth Jones

Printed Name of Resident/Patient

[Signature]

Resident's Authorized Representative

4-17-07

Date

Ellen Jenkins

Printed Name of Resident's Authorized Representative

Sally Adam, MD

Facility's Authorized Agent

4-17-07

Date

Sally Dobson

Printed Name of Facility's Authorized Agent

Initial

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)

IN THE COURT OF COMMON PLEAS

Cherry T. Scott, as Personal)
Representative of the Estate of)
Elizabeth Jones,)
)
Plaintiff,)

Civil Action No. 2010-CP-25-491 & 492

vs.)

STIPULATION AS TO TRANSCRIPT
OF HEARING DATED OCTOBER 7,
2011

Heritage Healthcare of Estill, LLC)
d/b/a Heritage of the Lowcountry)
and/or d/b/a Uni-Health Post Acute)
Care of the Lowcountry, United)
Clinical Services, Inc., United)
Rehab, Inc., and UHS-Pruitt)
Corporation,)
Defendants.)

COMES NOW plaintiff, Cherry T. Scott, as Personal Representative of the Estate of Inez Roberts, and defendants, Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry and/or d/b/a Uni-Health Post Acute Care of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation, by and through their undersigned counsel, who do hereby agree and stipulate to the following:

1. A hearing on defendants' Motion to Compel Arbitration was held before the Honorable Carmen T. Mullen on October 7, 2011, with Deborah Everett serving as the court reporter.

2. Defendants requested a copy of the hearing transcript via letter to Ms. Everett dated October 11, 2011. By letter dated November 8, 2011, defendants sent Ms. Everett pre-payment for the transcript of the hearing pursuant to her email request.

3. Despite multiple letters to Ms. Everett following up on defendants' request and payment for the hearing transcript, Ms. Everett never provided a written transcript.

4. With the assistance of Court Administration, counsel for the defendants received a written transcript prepared by Harriet Bennett on February 15, 2013.

5. Counsel for both parties reviewed the written transcript prepared by Ms. Bennett and found numerous typographical and/or stenographical errors. Counsel for both parties notified Ms. Bennett in writing and provided an errata sheet for their respective errors.

6. By letter dated March 13, 2013, Ms. Bennett responded that she prepared the written transcript using the audio taken from Ms. Everett's stenomask. As a result, she was not in a position to make any changes to what was said into the stenomask by Ms. Everett.

7. Both parties believe that an errata sheet would be beneficial to any person reviewing the written transcript to provide clarity for the respective arguments made at the October 7, 2011 hearing. Furthermore, it is the parties' agreement that the corrections listed below were the actual terms presented to the lower court on October 7, 2011, and thus proper to be included in the Record on Appeal.

8. Accordingly, the parties set forth herein a list of typographical and/or stenographical errors in order of their appearance in the written transcript:

<u>Location</u>	<u>Error</u>	<u>Correction</u>
<i>Page 4, line 11-12</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 4, line 17</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 4, line 18</i>	<i>Triple A rule</i>	<i>AAA rules</i>

<u>Location</u>	<u>Error</u>	<u>Correction</u>
Page 4, line 22	Triple A	AAA
Page 4, line 22	in accordance	we select one in accordance
Page 5 line 13	in	and
Page 5 line 14	perception	presumption
Page 6 line 8	admissions	submissions
Page 6 line 16	Curry	Currie
Page 6 line 19	benefit-sharing	beneficiary
Page 7 line 13	Triple A	AAA
Page 7 line 15	Triple A	AAA
Page 8 line 1	Triple A	AAA
Page 8 line 5	procedure	proceeding
Page 8 line 8	positions	associations
Page 8 line 12	Triple A	AAA
Page 8 line 14	fault	flaw
Page 8 line 15	Triple A	AAA
Page 8 line 25	Curry	Currie
Page 9 line 4	(inaudible)	Health Lawyers Association
Page 9 line 5	Curry	Currie
Page 9 line 10	Triple A	AAA
Page 9 line 15	Triple A form	AAA forum
Page 9 line 19	recused	refused

<u>Location</u>	<u>Error</u>	<u>Correction</u>
Page 10 line 1	validates	Invalidates
Page 10 line 2	Curry	Currie
Page 10 line 4	Triple A	AAA
Page 10 line 5	Curry	Currie
Page 10 line 14	Tims	Timms
Page 11 line 2	Its own	it in the
Page 11 line 8	faith	ways
Page 11 line 12	pursued	sued
Page 11 line 18	McCullum versus (inaudible)	McCollum v. Tenet Healthcare
Page 11 line 19	Tow	Towles
Page 12 line 11	Is filed	isn't filed
Page 13 line 21	not	now
Page 15 line 14	radius	main
Page 15 line 23	Triple A	AAA
Page 16 line 2	Triple A	AAA
Page 16 line 4	Form	Forum
Page 16 line 8	Triple A	AAA
Page 16 line 13	Form	Forum
Page 16 line 13	Form	Forum
Page 17 line 5	Triple A	AAA
Page 17 line 12	Triple A	AAA
Page 17 line 12	Triple A	AAA

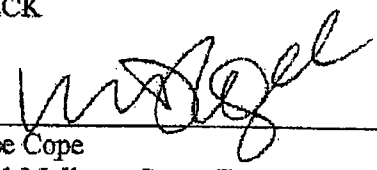
<u>Location</u>	<u>Error</u>	<u>Correction</u>
<i>Page 17 line 15</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 18 line 16</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 19 line 20</i>	<i>compell</i>	<i>compel</i>
<i>Page 20 line 2</i>	<i>Judge (inaudible)</i>	<i>Judge Brown</i>
<i>Page 21 line 10</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 21 line 10</i>	<i>Triple A</i>	<i>AAA</i>
<i>Page 22 line 1</i>	<i>Form</i>	<i>Forum</i>
<i>Page 23 line 5</i>	<i>were</i>	<i>weren't</i>
<i>Page 24 line 5</i>	<i>Curry</i>	<i>Currie</i>

Signature Pages to Follow

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH
& DETRICK

By: _____


Lee Cope
101 Mulberry Street East
Post Office Box 457
Hampton, South Carolina 29924

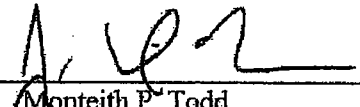
LANIER & BURROUGHS, LLC

Charles J. McCutchen
Post Office Drawer 2789
Orangeburg, South Carolina 29116

Attorneys for Plaintiff

March ____, 2013

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Atlanta, Georgia 30363

(404) 873-8500

Attorneys for Defendants

March____, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF HAMPTON)
)
CHERRY SCOTT, as)
Personal Representative of the)
Estate of ELIZABETH JONES,)

Plaintiff)

v.)

HERITAGE HEALTHCARE)
OF ESTILL, LLC d/b/a Heritage)
Of the Lowcountry and/or)
d/b/a Uni-Health Post Acute Care of)
of Lowcountry, UNITED)
CLINICAL SERVICES, INC.,)
UNITED REHAB, INC., and)
UHS- PRUITT CORPORATION)

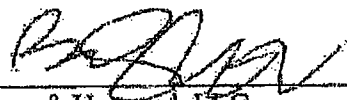
Defendants)

IN THE COURT OF COMMON PLEAS
C/A NO.: 10-CP-25-127 (Wrongful Death)

Mediation Report

Pursuant to S.C. Code §15-79-125(c), the parties mediated the case before me as mediator on September 10, 2010. The necessary parties were present and represented by counsel. The parties were unable to reach a settlement. A Notice of Intent to File Suit was given by Plaintiff's counsel as required by the statute. It is now appropriate for Plaintiff to file suit.

Respectfully submitted,



Wilson & Heyward, LLC
Bonum S. Wilson, III, Esquire
Post Office Box 13177
Charleston, SC 29422

October 4, 2010.

STATE OF SOUTH CAROLINA)

COUNTY OF HAMPTON)

CHERRY SCOTT, as)
Personal Representative of the)
Estate of ELIZABETH JONES,)

Plaintiff)

v.)

HERITAGE HEALTHCARE)

OF ESTILL, LLC d/b/a Heritage)

Of the Lowcountry and/or)

d/b/a Uni-Health Post Acute Care of)

of Lowcountry, UNITED)

CLINICAL SERVICES, INC.,)

UNITED REHAB, INC., and)

UHS- PRUITT CORPORATION)

Defendants)

IN THE COURT OF COMMON PLEAS

C/A NO.: 10-CP-25-126 (Survival Action)

Mediation Report

Pursuant to S.C. Code §15-79-125(c), the parties mediated the case before me as mediator on September 10, 2010. The necessary parties were present and represented by counsel. The parties were unable to reach a settlement. A Notice of Intent to File Suit was given by Plaintiff's counsel as required by the statute. It is now appropriate for Plaintiff to file suit.

Respectfully submitted,


Wilson & Heyward, LLC
Bonum S. Wilson, III, Esquire
Post Office Box 13177
Charleston, SC 29422

October 10, 2010.

**Resident and Facility
Arbitration Agreement**
Please Read Carefully

It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or "Authorized Representative", together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by binding arbitration. This means that the parties are waiving their right to a trial before a jury or a judge.

1. Claims. For purposes of this Arbitration Agreement, a Claim shall include, without being limited to, a claim for payment, nonpayment, or refund for services rendered to the Resident by the Facility, violations of any right granted to the Resident by law or by the Admission Agreement, breach of contract, fraud or misrepresentation, negligence, gross negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.

This Arbitration Agreement shall in no way, however, limit the Resident's right to file a grievance or complaint, formal or informal, with the Facility, the long-term care ombudsman, or any appropriate government agency. This Arbitration Agreement does not affect the Facility's duties with respect to the provision of care and treatment.

2. Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceeding shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

All related to the same incident, transaction, or related course of care or services, must be arbitrated in one arbitration proceeding. Any claim that arose before the date that a notice of arbitration is given to the Facility or received by the resident must be presented in the arbitration proceeding for which notice is given or it shall be considered waived and forever barred.

3. Awards. The Resident and the Facility agree that any damages awarded as a result of arbitration under this Arbitration Agreement shall be determined in accordance with state or federal law that is applicable to a comparable civil action, including any prerequisites to, credit against, or limitations on, such

damages. The prevailing party in the arbitration proceeding or in any legal proceedings connected to the arbitration proceeding or this Arbitration Agreement shall be entitled to recover any reasonable attorneys' fees and costs that are actually incurred as a result.

4. Binding Effect. The parties intend that this Arbitration Agreement shall benefit and be binding upon the parties, their successors and assigns, including the agents, employees of the Facility, and anyone whose Claim is derived through or on behalf of the Resident, including, without being limited to, any parent, spouse, child, guardian, executor, administrator, legal representative, or heir of the Resident.
5. Applicable Law. The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law. Furthermore, the provisions of this Arbitration Agreement remain in effect after the Resident's Admission Agreement has been terminated.
6. Right to Consultation. The Resident understands that the Resident has the right to consult an attorney of his or her choice about this Arbitration Agreement and to receive an explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

BY SIGNING THIS AGREEMENT, THE RESIDENT ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS ITS CONTENTS.

Resident's Signature

Date

Elizabeth Jones

Printed Name of Resident/Patient

Ellen Jenkins

Resident's Authorized Representative

4-17-07

Date

Ellen Jenkins

Printed Name of Resident's Authorized Representative

Sally Dobson, SSO

Facility's Authorized Agent

4-17-07

Date

Sally Dobson

Printed Name of Facility's Authorized Agent

Initial

NURSING ADMISSION ASSESSMENT

I. GENERAL

Name: Eliashah Jones Date of Birth: 11/12/47 Age: 59
 Admission Date: 4/18/07 Time: 12:45 A.M./P.M.
 Admitted From: ☒ Home ☒ Hospital ☐ Nursing Home ☐ Other
 How Admitted: ☐ Ambulatory ☐ W/C ☒ Stretcher
 Family Member Present During Admission: ☐ Yes ☒ No
 If yes, Name/Relationship: _____

Current Diagnosis: _____
 Current Medications: _____
 Reason/Diagnosis: _____

Allergies: Drug AKA
 Food AKA

General Appearance: ☒ Alert ☐ Clean ☐ Unkept ☐ Body Odor

II. NEUROSENSORY/COGNITIVE

Level of Consciousness: Oriented to ☒ Person ☒ Place ☒ Time ☒ Current Events
☐ Persistent Vegetative State ☐ Comatose
 Mental/Behavioral Status: ☒ Alert ☐ Lethargic ☒ Cooperative ☐ Combative ☐ Agitated
☐ Delusional ☐ Hallucinations
 History of: ☐ Wandering ☐ Falls ☐ Fainting/Dizziness ☐ Seizures
 Vision: ☒ Glasses ☐ Poor ☐ Blind Hearing: ☐ Hearing Aide ☐ Right ☐ Left
 Speech: ☒ Clear ☐ Incoherent ☐ Deaf ☐ Right ☐ Left

III. ELIMINATION

Bladder: ☒ Continent ☐ Incontinent ☐ Catheter ☐ Urostomy ☐ Urgency ☐ Frequency ☐ Burning
☐ Retention ☐ Nocturia ☐ Pain ☐ History of U.T.I.

Bowel: ☒ Continent ☐ Incontinent ☐ Constipation ☐ Diarrhea ☐ Laxatives ☐ Enemas
☐ Bleeding ☐ History of Impaction Date of Last B/M: _____

IV. MUSCULOSKELETAL

Movement of Extremities: (R) added weakness CVA
 Right Side: ☐ Splints/Prosthesis ☐ Voluntary ☐ Involuntary ☐ Tremors ☐ Deformities ☐ Contractures ☐ Amputation ☐ Paralysis
 Left Side: ☐ Splints/Prosthesis ☐ Voluntary ☐ Involuntary ☐ Tremors ☐ Deformities ☐ Contractures ☐ Amputation ☐ Paralysis
 Mobility: ☐ Ambulate ☒ W/C ☒ Walker/Cane ☐ Bedup ☐ Assist ☐ N/A

Re: int: ☒ Yes ☐ No Type _____ In Bed _____ OOB _____

11/20/09

Side rails XI for mobility & movement

JONES-UPA000000869

V. CIRCULATORY/RESPIRATORY

Extremities:

- ☒ Cold to Touch
- ☒ Numbness
- ☒ Color: Unusual Pallor
- ☒ Paresthesia

- ☒ Pulse: Present at Radial
- ☒ Warm
- ☒ Tender to Touch
- ☒ Edema

- ☐ Ulcer
- ☐ Tingling
- ☐ Cyanosis
- ☐ Pedal

Respiratory:

- ☐ Cough
- ☐ Productive
- ☐ Blood Tinged

- ☐ Congested
- ☐ Non Productive

Respirations/Rate:

- ☒ Normal
- ☐ Dyspnea
- ☐ Shortness of Breath
- Breath Sounds:

- ☐ Deep
- ☐ Audible Wheeze
- ☐ Clear
- ☐ Shallow
- ☐ Orthopnea
- ☐ Rhonchi
- ☐ Wheeze

Circulatory/Heart Rate:

- ☒ Regular
- ☐ Missing a Beat

- ☐ Irregular
- ☐ Abnormally Strong
- ☐ Strong
- ☐ Weak/Thready

Color (face): Normal

- ☒ Cyanosis (see below)
- a. Mucous Membranes
- b. Lips
- c. Nailbeds

Normal

Blood Pressure:

Position (Circle One): Standing

Sitting

Lying

Temperature:

Oral

Rectal

Axillary

VI: ORAL/NUTRITION

Weight: 210 lbs

Height: 5' 8"

Dentures: ☒ Upper ☐ Lower ☐ No Teeth ☐ Own Teeth

☐ Swallowing Problem: ☐ Chewing Problem ☐ N/V

Tube Feeding: Type: PEG tube (see skin assessment for appearance)

Pain:

☒ No Complaints ☐ Complain Once Per Day ☐ Complains more than once per day

Intensity: ☐ Mild ☐ Moderate ☐ Excruciating

Location: (R) side pain Exacerbating Factors: on

Alleviating Factors: aspirin

Resident/Family education needs: Long-term

Discharge plans: Short-term (less than 1 year) Long-term

Nurse Signature: [Signature] Date: 4/18/07

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JONES-UPA000000870

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AAA, the world's largest provider of alternative dispute resolution services, has also determined that there will be no change in the administration of cases in the health care area where businesses, providers, health care companies, or other entities are involved on both sides of the dispute.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case Nos. 2010-CP-25-491 and 2010-CP-25-492
South Carolina Court of Appeals No. 2012-207308

CHERRY SCOTT, as Personal Representative of the Estate
of ELIZABETH JONES,

Respondent,

v.

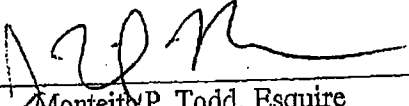
HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a
Heritage of the Lowcountry and/or Uni-Health Post Acute
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material
proposed and agreed to be included by the parties and not any other material.

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August 12, 2013

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court err in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act where the parties acknowledged interstate commerce in their arbitration agreement and the Plaintiff alleged in her Complaint that out-of-state companies were responsible for the level of care provided?**

 - A. The FAA governs because the parties specifically acknowledged interstate commerce and agreed that the FAA would apply.**
 - B. The FAA governs because the transaction between the parties involves interstate commerce.**
- II. Did the trial court err in refusing to enforce the Arbitration Agreement in accordance with its plain terms?**

 - A. The trial court erred in concluding that Ms. Jenkins "lacked standing," to enter into the Arbitration Agreement.**
 - B. The trial court erred in finding that there was no "meeting of the minds" between the parties regarding the arbitration agreement.**
 - C. The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.**
 - D. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement.**

STATEMENT OF THE CASE

This appeal involves the denial of a motion to compel arbitration of a nursing home dispute in accordance with the terms of a pre-dispute arbitration agreement.

On October 13, 2010, Plaintiff/Respondent Cherry T. Scott ("Plaintiff") commenced wrongful death and survival actions alleging nursing home negligence. (R. pp. 89-110) Plaintiff sued Heritage Healthcare of Estill, LLC ("Heritage"), United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation ("UHS-Pruitt") (collectively referred to herein as "Defendants").

Defendants timely served answers to the complaints on November 24, 2010. (R. pp. 111-158) In their Answers, Defendants asserted as a defense that Plaintiff's claims were barred pursuant to the terms of an arbitration agreement covering Plaintiff's claims. (R. pp. 112-113, ¶¶ 15-16; R. pp. 118-119, ¶¶ 15-16; R. pp. 124-125, ¶¶ 15-16; R. pp. 130-131, ¶¶ 15-16)¹ On December 1, 2010, Plaintiff moved to strike certain of Defendants' defenses, including defenses relating to arbitration. (R. pp. 159-162) By Orders dated March 4, 2011, the Court denied Plaintiff's motions to strike the arbitration defenses. (R. pp. 17-20.)

Following the Orders denying the Motions to Strike, the Defendants engaged in limited discovery solely related to arbitration. Defendants moved for an order compelling arbitration on August 3, 2011. (R. pp. 165-186) Plaintiff filed a response to Defendants' motion on October 6, 2011. (R. pp. 187- 464) Following a hearing held on October 7, 2011, the trial court entered an order drafted by the Plaintiff denying Defendants' Motion

¹ The Answers of the four Defendants were filed concurrently and are identical in all respects material to this appeal. These have been collectively cited as "Answers," for the sake of brevity.

to Compel Arbitration. (R. pp. 1-14) Defendants received a copy of the Order on November 16, 2011. On November 28, 2011, Defendants filed a motion for reconsideration. (R. pp. 465-554) Plaintiff filed a response to this motion on December 13, 2011. (R. pp. 555-561) The court denied Defendants' motion for reconsideration by Order entered January 17, 2012. (R. pp. 15-16) On February 2, 2012, Defendants filed a Notice of Appeal. (R. pp. 562-581)

FACTS

Defendant Heritage operates a skilled nursing facility known as Heritage of the Lowcountry ("Lowcountry") located in Estill, South Carolina, in which Elizabeth Jones was a resident from April 18, 2007 through May 15, 2009. Ms. Jones was admitted to Lowcountry by her sister, Ellen Jenkins. Prior to Ms. Jones's admission to Lowcountry, Ms. Jenkins spoke with Ms. Jones and her other siblings, and they all understood that Ms. Jenkins would execute the paperwork in connection with Ms. Jones's admission to Lowcountry. (R. p. 638, page 8, line 14—p. 639, page 9, line 24; R. p. 628, page 8, line 9—p. 629, page 10, line 14)

In order to admit Ms. Jones to Lowcountry, Ms. Jenkins contracted with Lowcountry on behalf of Ms. Jones. Among the contracts that Ms. Jenkins entered into on behalf of Ms. Jones in connection with her admission to Lowcountry was the Resident and Facility Arbitration Agreement ("Arbitration Agreement"). (R. p. 640, page 13, lines 1-14) Ms. Jenkins discussed Ms. Jones's admission to Lowcountry with Ms. Jones after Ms. Jenkins had completed the admissions process, and Ms. Jones understood that Ms. Jenkins had signed her into the nursing home. (R. p. 641, page 17, lines 19-25) Based on the contracts executed by Ms. Jenkins on behalf of Ms. Jones, Heritage admitted Ms.

Jones to Lowcountry, and Ms. Jones remained a resident of Lowcountry from April 18, 2007 until May 15, 2009.

The Arbitration Agreement provides in part that “any and all controversies, claims, disputes, disagreements or demands of any kind . . . arising out of or related to the Resident’s Admission Agreement with the Facility . . . or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**.” (R. p. 653) (emphasis in original) The Arbitration Agreement states “that the parties are waiving their right to a trial before a jury or a judge.” (R. p. 653) The Arbitration Agreement encompasses all claims involving “negligence, gross-negligence, malpractice, or any other claim based on any departure from accepted standards of medical or health care or safety whether sounding in tort or in contract.” (R. p. 653, ¶ 1.)

Despite the clear terms of the Arbitration Agreement, Plaintiff filed her civil Complaints alleging that the Defendants were liable for injuries that Ms. Jones allegedly sustained while she was a resident of Lowcountry. (R. pp. 89-110) Plaintiff’s allegations were based upon a theory that Ms. Jones did not receive proper care and treatment while at Lowcountry as a result of the actions or inactions of the Defendants. (R. pp. 89-110)

Because Plaintiff’s claims fell within the scope of the Arbitration Agreement, the Defendants asserted defenses in their Answers that Plaintiff’s claims were barred by the Arbitration Agreement. (R. pp. 112-113, ¶¶ 15-16; R. pp. 118-119, ¶¶ 15-16; R. pp. 124-125, ¶¶ 15-16; R. pp. 130-131, ¶¶ 15-16) Following the denial of Plaintiff’s motions to strike Defendants’ arbitration-based defenses, Defendants engaged in discovery that was expressly limited to issues related to arbitration. (R. p. 637, page 4, lines 12-23; R. p. 627, page 4, line 12—p. 628, page 5, line 20) Following this limited discovery period, the

Defendants moved to compel arbitration of the claims asserted in the Complaints. (R. pp. 165-186) It is from the denial of this motion and a subsequent motion for reconsideration that the Defendants appeal.

STANDARD OF REVIEW

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). This determination is subject to de novo review. *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). A circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings. *Aiken v. World Fin. Corp. of S.C.*, 373 S.C. 144, 148, 644 S.E.2d 705, 707 (2007).²

ARGUMENTS

- I. The trial court erred in concluding that the Motion to Compel Arbitration was not governed by the Federal Arbitration Act because the transaction involved interstate commerce.**

The FAA provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity." 9 U.S.C. § 2. The FAA applies in federal or state court to any arbitration agreement that "in fact" involves interstate commerce, regardless of whether or not the parties contemplated an interstate

² There is obviously some conflict between these two standards of review as "[d]e novo review permits appellate court fact-finding, notwithstanding the presence of evidence supporting the trial court's findings." *Lewis v. Lewis*, 392 S.C. 381, 390, 709 S.E.2d 650, 654-55 (2011).

transaction. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538; 542 S.E.2d 360, 363 (2001).³

The South Carolina Court of Appeals has succinctly stated:

The words 'involving commerce' have been interpreted by the United States Supreme Court as being the functional equivalent of 'affecting commerce'-words signaling 'an intent to exercise Congress' commerce power to the full.' *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) . . . 'Because the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually in commerce-that is, within the flow of interstate commerce.' *Citizens Bank [v. Alafabco, Inc.]*, 539 U.S. [52,] [] 56, 123 S.Ct. [2037,] [] 2040 [(2003)].

Thornton v. Trident Medical Center, LLC, 357 S.C. 91, 95, 592 S.E.2d 50, 52 (Ct. App. 2004). "To ascertain whether a transaction involves commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts." *Zabinski*, 346 S.C. at 594, 553 S.E.2d at 117.

A. The FAA governs because the parties specifically acknowledged interstate commerce and agreed that the FAA would apply.

In the Arbitration Agreement, the parties specifically acknowledged that their transaction involved interstate commerce and would be governed by the FAA:

The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

³ *Munoz* expressly overruled *Mathews v. Fluor Corp.*, 312 S.C. 404, 440 S.E.2d 880 (1994), to the extent that the *Mathews* court considered "whether the parties contemplated interstate commerce as a factor in determining if the FAA applied." *Munoz*, at n. 3.

(R. p. 654, ¶ 5) South Carolina courts have held that such agreement alone is sufficient to invoke the FAA.⁴ Courts outside of South Carolina agree that the parties' acknowledgment that the arbitration agreement involves interstate commerce and will be governed by the FAA is dispositive of the issue.⁵ Accordingly, the parties were entitled to rely on their stipulation that their transaction involved interstate commerce and that the Arbitration Agreement would be governed by the FAA, and the trial court erred in holding that this matter did not involve interstate commerce.⁶

⁴ See, e.g., *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) ("The parties' arbitration agreement provides that the arbitration shall be administered pursuant to the FAA."); *Munoz*, 343 S.C. at 539, 542 S.E.2d at 363-364 ("Here, the arbitration agreement which applies to 'this contract and the relationships which result from this contract,' provides it shall be governed by the FAA. Arbitration agreements, like other contracts, are enforceable in accordance with their terms."); *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *13 (D.S.C. Dec. 15, 2011) ("The Arbitration Agreement here clearly states that 'the services and reimbursement thereof effects a transaction that involves interstate commerce.' [cit.] Courts look to the terms of the arbitration agreement itself as evidence of whether the transaction involves interstate commerce."); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 at *4, n.3 (D.S.C. Sept. 13, 2011) ("The parties here do not dispute that the FAA applies.").

⁵ See, e.g., *Bales v. Arbor Manor*, 2008 U.S. Dist. Lexis 99215 (D. Neb. July 3, 2008) (involving stipulation in admission agreement that interstate activity was involved); *Ivey v. Horton*, 2008 U.S. Dist. Lexis 52971 (D.S.C. July 10, 2008) (recognizing broad reach of *Allied-Bruce*); *Thomas v. Cook*, 350 S.W.3d 382 (Tex. App. 2011) (holding that when the parties expressly invoke the FAA in the arbitration agreement, the FAA governs and the parties are not required to establish that the transaction at issue affects interstate commerce); *In re Choice Homes, Inc.*, 174 S.W.3d 408 (Tex. App. 2005) (same); *In re Ledet*, 2004 Tex. App. Lexis 11474 (Tex. App. Dec. 22, 2004) (holding that when parties agree to arbitrate under the FAA, no independent showing of interstate commerce is necessary).

⁶ The trial court's conclusion that "parties cannot 'stipulate' to interstate commerce that would invoke the FAA," (R. p. 9) is not supported by any cited authority and is contrary to the numerous cases inside and outside of South Carolina applying the FAA based on the parties' stipulation (either in the arbitration agreement or before the trial court). See cases cited *supra*, notes 4 and 5.

B. The FAA governs because the transaction between the parties involves interstate commerce.

In addition to the parties' express agreement that their transaction involved interstate commerce, the Complaints and the surrounding facts evidence interstate commerce. The Plaintiff alleges that Defendant Heritage is a South Carolina skilled nursing facility organized under the laws of South Carolina with a principal place of business in Hampton County. (R. p. 89, ¶ 2; R. p. 100, ¶ 2) The Plaintiff alleges that Defendants United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt are all *Georgia* corporations doing business in South Carolina. (R. p. 90, ¶¶ 3-5; R. p. 101, ¶¶ 3-5) The Plaintiff alleges that these out-of-state Defendants are responsible for the care provided to Ms. Jones at Lowcountry and that acts or omissions of these out-of-state Defendants caused Lowcountry to deliver care to Ms. Jones that failed to meet the standard of care. (R. p. 90, ¶ 6; R. p. 101, ¶ 6) On their face, the Complaints aver a relationship involving interstate commerce under the provisions of the FAA. *See Pickering v. Urbantus, LLC*, 827 F. Supp. 2d 1010 (S.D. Iowa 2011) (noting that the FAA is applicable to nursing facilities that are operated by entities from other states). Though the out-of-state Defendants deny the allegations regarding the alleged level of control over Lowcountry, these allegations assert claims that involve interstate commerce, and thus bring the matter within the purview of the FAA. Additionally, the out-of-state Defendants admitted that UHS-Pruitt provided services in Hampton County. (R. pp. 112, ¶6; R. pp. 118, ¶ 6; R. pp. 124, ¶6; R. pp. 130, ¶ 6)

In reaching its conclusion that interstate commerce was not implicated and thus the FAA was inapplicable, the trial court based its decision on *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993). (R. pp. 8-10) In *Timms*, the parties had not agreed that their

transaction involved interstate commerce or that their arbitration agreement would be governed by the FAA, and *Timms* is distinguishable on that basis alone. Moreover, *Timms* relied on a narrow interpretation of “involving commerce” that has since been rejected by the United States Supreme Court. *Allied-Bruce*, 513 U.S. 265. South Carolina consistently has followed *Allied-Bruce*. See, e.g., *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 454-55, 730 S.E.2d 312, 315-16 (2012); see also *Citizens Bank*, 539 U.S. 52 (holding that no elaborate explanation needed to show an impact on interstate commerce upon consideration of the ‘general practice’ those transactions represent). The trial court erred in ignoring the evidence of interstate commerce (including the parties’ acknowledgement) and in relying on *Timms* and failing to rely on the more recent cases following *Allied-Bruce*.

II. The trial court erred in refusing to enforce the Arbitration Agreement in accordance with its plain terms.

“[T]here is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes.” *Herron v. Century BMW*, 387 S.C. 525, 531, 693 S.E.2d 394, 397 (2010). In enacting the FAA, Congress established a strong federal policy in support of arbitration agreements, “requiring that [courts] ‘rigorously enforce agreements to arbitrate.’” *Shearson/Amer. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

This strong federal policy in favor of arbitration reflects Congress’s and the Supreme Court’s belief that arbitration is fair and beneficial. The United States Supreme Court decisions reflect a determination that “there are real benefits to the enforcement of arbitration provisions.” *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 122-123 (2001).

"The advantages of arbitration are many: it is usually cheaper and faster than litigation; it can have simpler procedural and evidentiary rules; it normally minimizes hostility and is less disruptive of ongoing and future business dealings among the parties; it is often more flexible in regard to scheduling of times and places of hearings and discovery devices. . . ." *Allied-Bruce*, 513 U.S. at 280 (quoting H. R. Rep. No. 97-542, p. 13 (1982)). Recently, the Supreme Court has specifically held that this federal policy in favor of arbitration includes claims involving nursing care. *Marmet Healthcare Center v. Brown*, 132 S.Ct. 1201 (2012).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118. "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to *any* interpretation which would cover the asserted dispute." *Id.* at 597, 553 S.E.2d at 118-19 (emphasis added).

Under the FAA, a party seeking arbitration must only show two things in order to compel arbitration: (1) that a written agreement to arbitrate exists, and (2) that the written agreement is contained within a contract involving commerce. 9 U.S.C. § 2 (2006).

Section 4 of the FAA provides, in pertinent part, as follows:

The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, *the court shall make an order directing the parties to proceed to arbitration* in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added). "By its terms, the act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall

direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

It is undisputed that Ms. Jenkins signed the Arbitration Agreement, a two-page, standalone agreement clearly titled "Resident and Facility Arbitration Agreement." (R. pp. 653-654) The Arbitration Agreement states, in pertinent part, as follows:

It is hereby understood and agreed by Heritage of the Lowcountry and Ellen Jenkins and or "Authorized Representative," together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**. This means that the parties are waiving their right to a trial before a jury or a judge.

(R. p. 653) (emphasis in original)

The execution of the Arbitration Agreement was knowing and voluntary. In fact, the Arbitration Agreement advises of the right to contact an attorney to obtain further explanation regarding the Arbitration Agreement. (R. p. 654, ¶ 6) ("**Right to Consultation. The Resident understands that the Resident has the right to consult an attorney of his or her choice about this Arbitration Agreement and to receive an explanation or clarification from the Facility's admissions coordinator. The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.**") (emphasis in original).)

Ms. Jenkins, on behalf of Ms. Jones, represented that she had the opportunity to read the Arbitration Agreement and understood its contents. Immediately above the signature line and in all upper case type, the Arbitration Agreement states as follows:

BY SIGNING THIS AGREEMENT, THE RESIDENT
ACKNOWLEDGES THAT THE RESIDENT HAS HAD THE

OPPORTUNITY TO READ THIS AGREEMENT OR IT HAS BEEN
READ TO THE RESIDENT AND THE RESIDENT UNDERSTANDS
ITS CONTENTS.

(R. p. 654)

A. The trial court erred in concluding that Ms. Jenkins "lacked standing," to enter into the Arbitration Agreement.

The trial court erred in concluding that Ms. Jenkins "lacked standing" to enter into the arbitration agreement. Upon review of the trial court's order, it appears that the real issue was one of agency, as the court found that Ms. Jenkins lacked the authority to enter into the agreement on behalf of Ms. Jones. The validity of the arbitration agreement in this case must be determined in accordance with the general principles of contract law and agency law that would apply to any other contract. *Herron*, 387 S.C. at 531, 693 S.E.2d at 397. By allowing Ms. Jenkins to procure her admission to Lowcountry and accepting the benefits of the contracts entered into in connection with that admission, Ms. Jones represented that Ms. Jenkins was her authorized representative to act on her behalf in connection with her admission. *See R&G Constr., Inc., v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 433, 540 S.E.2d 113, 118 (Ct. App. 2000).

1. Ms. Jenkins had actual authority to contract on behalf of Ms. Jones with respect to her admission to Lowcountry, and Ms. Jones ratified Ms. Jenkins's actions.

In this case, the evidence is undisputed that Ms. Jones authorized Ms. Jenkins to negotiate her admission to Lowcountry. (R. p. 638, page 8, line 18—p. 639, page 10, line 14; R. p. 629, page 9, lines 2-17) Ms. Jones placed no limitations on Ms. Jenkins with respect to her authority in dealing with Lowcountry. (R. p. 629, page 10, lines 2-10) The trial court found that Ms. Jones was competent, and she was therefore competent to appoint Ms. Jenkins to act as her agent for purposes of admitting her into Lowcountry.

(R. p. 13) The Plaintiff has testified that she knew that Ms. Jenkins was signing the admission paperwork for Ms. Jones. (R. p. 629, page 9, lines 12-17) It is disingenuous for Plaintiff now to claim she should not be bound by a contract when Plaintiff herself acknowledges that Ms. Jones elected for Ms. Jenkins to act as her agent in signing contracts related to her admission to Lowcountry.

Agency is the fiduciary relationship resulting from the manifestation of consent by one person to another that the other shall act on behalf of and subject to the control of the first, and of consent by the other so to act. *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 425 S.E.2d 764 (Ct. App. 1992). In order for agency to exist, therefore, one person (the "principal") must intend that another (the "agent") act on his behalf, the agent must intend to accept the authority of the principal and act on it, and the intention of each must be manifest either in words or conduct between them. *Courtney v. Remler*, 566 F. Supp. 1225, 1230 (D.S.C. 1983). *See also S.B. McMaster, Inc. v. Chevrolet Motor Co.*, 3 F. 2d 469, 474 (4th Cir. 1925) (stating "[t]he agent must have assumed to represent the principal and to have performed the acts in his name and on his behalf").

In this case, Ms. Jones authorized Ms. Jenkins to execute her admission paperwork at Lowcountry, and Ms. Jenkins served as Ms. Jones's agent by executing the admissions paperwork, including the Arbitration Agreement, on Ms. Jones's behalf. In ruling that Ms. Jenkins "lacked standing" to enter into the Arbitration Agreement, the trial court failed to consider the undisputed evidence of Ms. Jones's express, unlimited grant of authority to Ms. Jenkins to act on her behalf in procuring her admission to Lowcountry.

Even if Ms. Jenkins was not Ms. Jones's actual agent for purposes of admitting her to the facility and signing her paperwork, there is an apparent agency relationship. *Watkins v. Mobil Oil Corp.*, 291 S.C. 62, 67, 352 S.E.2d 284, 287 (Ct. App. 1986). Ms. Jenkins and Ms. Jones represented to Lowcountry that Ms. Jenkins was authorized to execute Ms. Jones's admission paperwork at Lowcountry (which, in fact, she was). Based upon this representation, Lowcountry allowed Ms. Jenkins to sign all of the documents executed at the time of admission. *See Pee Dee Nursing Home v. Florence Gen. Hosp.*, 309 S.C. 80, 419 S.E.2d 834 (Ct. App. 1992).

Additionally, Ms. Jones (whom the trial court ruled was competent) accepted the benefits of the contracts with Lowcountry procured for her by Ms. Jenkins, ratifying those contracts through her conduct. One cannot ratify that part of the contract under which she has accepted the benefits and avoid that part which she later deems to be disadvantageous. *See Southern Bell Telephone & Telegraph Co. v. WRNO, Inc.*, 216 S.C. 533, 535-36, 59 S.E.2d 146, 147 (1950).

2. Ms. Jones was an intended third-party beneficiary of the contracts signed by Ms. Jenkins.

Ms. Jones is bound by the contract executed by Ms. Jenkins as a third-party beneficiary. Under South Carolina law, "[a] third-party beneficiary is a party that the contracting parties intend to directly benefit." *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). Ms. Jones's care was the essential purpose of the admission agreement, and as a third-party beneficiary, she (and her estate) are bound by the arbitration agreement. *See McCutcheon*, 2011 U.S. Dist. Lexis 144288; *Wiggins*, 2011 U.S. Dist. Lexis 103638 (rejecting argument that family member did not have authority to bind resident to arbitration); *Cook v. GGNCS Ripley, LLC*, 786 F. Supp. 2d

1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same).

3. Plaintiff is estopped from denying the enforceability of the Arbitration Agreement.

The trial court erred in holding the Plaintiff was not estopped from repudiating the arbitration agreement. In October 2012, the South Carolina Court of Appeals held that a nonsignatory could be bound by an arbitration provision within a contract executed by other parties. *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 288, 733 S.E.2d 597, 600-01 (Ct. App. 2012) ("Well-established common law principles dictate that in an appropriate case a nonsignatory can enforce, or be bound by, an arbitration provision within a contract executed by other parties.") (quoting *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)).

"Equitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity." *Int'l Paper*, 206 F.3d at 417-18 (citation and internal quotation marks omitted). "A nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)).

"Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during

litigation, attempt to repudiate the arbitration clause in the contract.” *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (citing *Tencara Shipyard*, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)).

The trial court erred in holding that the Plaintiff was not estopped. The mere fact that Ms. Jones did not sign the contract is not dispositive. Rather, where a party receives the benefits of the contract, which Ms. Jones certainly did, she is estopped to deny an arbitration agreement merely because that party did not sign the contract under which she received all of the benefits. Ms. Jones’s Estate is not free to pick and choose those portions of Ms. Jones’s agreements with Lowcountry it wants to enforce and those it does not and should be estopped from doing just that.

B. The trial court erred in finding that there was no “meeting of the minds” between the parties regarding the arbitration agreement.

The trial court ruled that there was no meeting of the minds as to the essential parts of the contract (R. pp. 10-11) (citing *Player v. Chandler*, 299 S.C. 101, 382 S.E.2d 891 (1989)) Because there is no evidence of a failure of the parties to agree to essential contractual terms, the trial court erred in refusing to enforce the arbitration agreement on the basis of a lack of a meeting of the minds.

It is well established in South Carolina that courts must enforce an unambiguous contract according to its terms, regardless of the contract’s wisdom or folly, or the parties’ failure to guard their rights carefully. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994); *Jordan v. Sec. Grp., Inc.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). “It is elementary that, if the contracting party is in position to learn the contents of a written contract and thereby protect himself by reading it or having it read,

one who is unable to read is bound to have the instrument read to him before signing it, just as one who can read is bound to read it before signing. So, also, if one signs a contract before it is completely filled out, he is bound thereby, in the absence of fraud.” *White v. S. Ry. Co.*, 208 S.C. 319, 343-44, 38 S.E.2d 111, 123 (1946).

The trial court based its conclusion that there was no meeting of the minds on a portion of the deposition testimony of Sally Dobson, Lowcountry’s admissions director. The trial court focused on Ms. Dobson’s lack of familiarity with the rules applicable to any arbitration which might take place under the Arbitration Agreement. (R. pp. 10-11) However, it is undisputed that Ms. Dobson did not discuss the applicable rules with Ms. Jenkins or Ms. Jones. (R. p. 634, page 11, lines 10-22; R. p. 640, page 14, lines 13-18) Ms. Dobson explained that the information that she provides to individuals signing the Arbitration Agreement is that “[w]hen they sign the Arbitration Agreement, that [waives] their right to a jury trial or, you know, having it in court.... They are informed of this whenever they are there to sign.” (R. p. 633, page 8, lines 9-14)

Ms. Jenkins acknowledged that she signed the arbitration agreement. (R. p. 640, page 14, lines 3-8) The South Carolina Supreme Court recently held that failure to read an arbitration agreement is not a defense:

The [plaintiffs] both admitted they did not read the arbitration agreement, and their deposition testimony confirmed the failure to read the documents was solely attributed to them and not to Century’s actions. Our jurisprudence forbids us to allow the [plaintiffs] to invalidate the enforceability of the arbitration agreement by claiming they did not read it.

Herron, 387 S.C. at 533, 693 S.E.2d at 398 (citing *Regions Bank v. Schmauch*, 354 S.C. 648, 582 S.E.2d 432 (Ct. App. 2003) (citing *Sims v. Tyler*, 276 S.C. 640, 281 S.E.2d 229 (1981)) (“A person who signs a contract or other written document cannot avoid the

effect of the document by claiming he did not read it.")). Finally, the intent of parties to a contract is determined by the written language in the contract, not by the subjective thoughts of either party to the contract. Therefore, Ms. Dobson's knowledge or lack of knowledge of the exact parameters of the arbitration agreement (which was never communicated to Ms. Jenkins or Ms. Jones) is irrelevant as to whether the written contract evidences a certain undertaking by the parties to arbitrate.⁷

The case cited by the trial court, *Player v. Chandler*, involved alleged oral modifications to a lease contract where at least some of the essential terms of the lease were never discussed and, therefore, there was no meeting of the minds. 299 S.C. at 105, 382 S.E.2d at 894. In the present case, Defendants seek to enforce the written Arbitration Agreement in accordance with its clear, unambiguous terms. There are no essential terms missing from the contract. Simply put, *Player* is not in any way relevant to the current case. Moreover, by signing the arbitration agreement, Ms. Jenkins acknowledged that she read and understood the agreement.

C. The trial court erred in concluding that the Arbitration Agreement's reference to the AAA Rules rendered the parties' agreement unenforceable.

The trial court's Order held that the following language in the Arbitration Agreement required any arbitration "to be handled under the auspices of the [AAA]":

Proceeding. Any arbitration proceeding that takes place under this Arbitration Agreement shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The arbitration proceedings shall be

⁷ By Plaintiff's logic, a wholly unambiguous loan agreement could be wiped out by the testimony of a loan officer who did not fully understand the mechanics of every provision of a loan document. Such a position is inconsistent with South Carolina law, particularly where, as in this case, the person signing the agreement admits that she was not misled and did not rely on the other party to explain the agreement to her.

conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA.

(R. p. 5) The trial court erroneously concluded that the AAA was "unavailable" based on a mistaken assumption that the AAA could no longer administer these types of claims.

(R. p. 6) (citing *Grant*, 383 S.C. 125, 678 S.E.2d 435))

This conclusion was erroneous because: (1) the Arbitration Agreement does not require administration by the AAA; (2) the AAA will arbitrate these claims and is, therefore, available; and (3) in any event, administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

1. The Arbitration Agreement does not require administration by the AAA.

By its express terms, the Arbitration Agreement requires only that the parties "follow the rules of the [AAA]," not that arbitration be administered by the AAA. This distinction is critical. Had the agreement at issue required the AAA to *administer* the arbitration, the rule enunciated in *Grant* may have controlled.⁸ However, the Arbitration Agreement here does not require administration by the AAA, but only requires that its rules be followed in conducting the arbitration. Additionally, the Arbitration Agreement only calls for a "neutral arbitrator selected in accordance with the rules of the AAA" and not an arbitrator associated with or employed by the AAA. (R. p. 653, ¶ 2.) Accordingly, this case is not controlled by *Grant* and the trial court erred in so ruling.

Numerous courts have correctly recognized the distinction between an arbitration agreement requiring use of the AAA Rules and one requiring administration by the AAA.

⁸ In *Grant*, the arbitration agreement required "arbitration *administered* by the National Health Lawyers Association (the 'NHLA')." *Grant*, 383 S.C. at 128, 678 S.E.2d at 436-37 (emphasis added).

The North Carolina Court of Appeals has held that the AAA's policy of refusing to accept healthcare arbitration based on pre-dispute arbitration agreements did not mandate the invalidation of an arbitration agreement containing provisions identical to the one at issue in the instant case. *Westmoreland v. High Point Healthcare, Inc.*, 721 S.E.2d 712 (N.C. Ct. App. 2012).⁹ In that case, the court held that the arbitration agreement, which merely required that the AAA rules be used, "did not provide that an AAA arbitrator must be used to conduct the arbitration" and "did not render the performance of the Arbitration Agreement impossible." *Id.* at 719. Instead, "[i]t simply meant that the arbitration could not be conducted under the auspices of the AAA." *Id.* at 719-20. In a later case where the arbitration agreement "specifically require[d] the use of 'arbitrators selected from the [AAA],'" the court held that the "language indicate[d] the parties' intention to arbitrate under the auspices of the AAA, unlike the procedure contemplated in *Westmoreland*." *Crossman v. Life Care Centers of America, Inc.*, 2013 N.C. App. Lexis 68 (N.C. Ct. App. Jan. 15, 2013). This distinction between provisions which merely

⁹ The arbitration agreement at issue in *Westmoreland* is attached to the court's opinion and is, in all relevant respects, identical to the Arbitration Agreement. See *Westmoreland*, 721 S.E.2d at 724-25.

require use of particular rules and those which require administration by a particular arbitral forum is reflective of the approach taken in courts across the country.¹⁰

¹⁰ *Mathews v. Life Care Centers of America, Inc.*, 177 P.3d 867, 872 (Ariz. Ct. App. 2008) (arbitration agreement requiring "a board of three arbitrators, selected from the American Arbitration Association [AAA]" could be enforced because the term simply provided the manner of selecting the arbitrator and did not require a particular forum); *Blue Cross Blue Shield of Alabama v. Rigas*, 923 So. 2d 1077, 1092 (Ala. 2005) (arbitration agreement that provided for the arbitration to be conducted according to the AAA rules and procedure could be enforced because "the statement of the AAA provides only that the AAA will not administer a dispute such as this one; it does not provide that [the] claims are not arbitrable"); *Covenant Health & Rehabilitation of Picayune, LP v. Moulds*, 14 So. 3d 695, 708-09 (Miss. 2009) (recognizing the distinction in cases between arbitration agreements requiring AAA administration and arbitration agreements requiring the use of AAA rules); *Fellerman v. American Retirement Corp.*, 2010 U.S. Dist. Lexis 43177 at *14 (E.D. Va. May 3, 2010) (addressing Rule R-2 of the AAA Rules and concluding that authorization to administer arbitration by using AAA rules "does not rise to the level of contractual assent to have the matter *exclusively* before that forum" and that courts tend to enforce arbitration agreements whose terms specify that the parties be bound only by the rules of the AAA); *Nail v. Consolidated Resources Health Care Fund I*, 229 P.3d 885, 889 (Wash. Ct. App. 2010) (holding that "AAA did not, and could not invalidate all pre-dispute arbitration agreements regarding individual health care claims unsupported by an additional post-dispute arbitration agreement" and that in specifying the method of choosing arbitrators, the agreement did not require exclusive AAA administration); *Oesterle v. Atria Mgmt. Co., LLC*, 2009 U.S. Dist. Lexis 60057 at *26 (D. Kan. July 14, 2009) ("Guided by the Supreme Court, this Court finds that the appropriate way to construe the arbitration provision is to read it as simply requiring arbitration in accordance with AAA rules and not AAA policy. Thus, the AAA provision covers the rules to abide by when conducting the arbitration, while AAA policy on the types of arbitrable claims is simply just that-AAA's policy."); *Deeds v. Blueshield of Idaho*, 141 P.3d 1079, 1080-81 (Idaho 2006) (even if the AAA would not designate an AAA arbitrator to administer the dispute in light of the Policy Statement, "no reason" why the arbitration could not proceed in accordance with the AAA Rules using a different arbitrator); *Trinity Mission v. Scott*, 19 So. 3d 735 ("While it would appear that the AAA would not administer the arbitration of this claim since there is only a pre-dispute agreement to arbitrate, it does not mean that arbitration is precluded. Arbitration pursuant to the AAA's rules and procedures would still be possible."); *Meskill v. GGNCS Stillwater Greeley, LLC*, 862 F. Supp. 2d 966, 973 (D. Minn. 2012) (arbitration agreement requiring arbitration "in accordance with the [NAF] Code of Procedure" did not mandate that the NAF conduct the arbitration, even where NAF rules provided that arbitrations using its rules and procedures could only be administered by the NAF and noting that "if the parties had contemplated the NAF would be their exclusive arbitral forum, they could have easily said so - there would be no need for them to do so obliquely by specifying that the arbitration must be conducted by the NAF's rules").

The arbitration agreement in this case does not require the arbitrator to be a member of the AAA. The only requirement is that the arbitrator is "neutral" and selected in accordance with the rules of the AAA. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. *Towles v. United HealthCare Corp.*, 338 S.C. 29, 41, 524 S.E.2d 839, 846 (1999) (citations omitted). Unlike the agreement at issue in *Grant*, the arbitration agreement here does not mandate that the AAA administer the arbitration. Rather, it merely requires the use of the AAA Rules and a neutral arbitrator. Thus, the arbitration agreement is not impacted by the AAA Policy Statement, which only involves the *administration* of arbitrations, and which courts across the country have correctly distinguished from the mere use of the AAA Rules.

2. The AAA is not "unavailable."¹¹

Even if the Arbitration Agreement had required administration by the AAA, as Plaintiff argues, the Policy Statement¹² does not render the AAA "unavailable." The AAA Policy Statement at issue stated in relevant part:

As a result of a review of its caseload in the health care area, the American Arbitration Association has announced that it will no longer accept the

¹¹ The AAA rules cited by the trial court do not require administration by the AAA. Rule R-2 does not make AAA the exclusive administering body of the arbitration, as it simply states that AAA could administer the arbitration if the parties chose. Likewise, Rules R-3, R-49, and R-51 would only apply in arbitrations where AAA is administering the arbitration. Furthermore, the copyrighting prohibition certainly does not mean that the AAA rules can only be used in such limited proscriptions as the AAA administration of an arbitration.

¹² It is important to note that the AAA Policy Statement effective January 1, 2003 is not a "rule" under the AAA. Other cases, including *Grant*, 383 S.C. 125, 678 S.E.2d 435, have addressed a similar issue involving the National Health Lawyers' Association (NHLA), who issued a *rule* change requiring a post-injury agreement to arbitrate before accepting arbitration. Those cases are distinguishable, in part, because of the difference in the AAA's Policy Statement, which does not render arbitration agreements invalid, and the NHLA's rule change, which would invalidate pre-injury arbitrations following those rules under that change.

administration of cases involving individual patients without a post-dispute agreement to arbitrate. In order to provide sufficient notice to provide for an orderly transition, this change will become effective on January 1, 2003.¹³

By its plain language, the AAA Policy Statement simply requires a post-injury agreement to arbitrate; it does not completely close the doors of the AAA to the types of claims asserted in Plaintiff's Complaints. If, as Plaintiff has argued and the trial court held, the use of AAA's Rules requires administration by the AAA, then the Plaintiff can have the result demanded by her proposed interpretation of the Arbitration Agreement simply by filing her demand for arbitration with the AAA. The plain language of the AAA Healthcare Policy Statement indicates that the AAA has not refused access to its forum for all healthcare disputes in general or to Plaintiff's dispute in particular. Instead, the Policy Statement is based solely on AAA's "review of its caseload in the healthcare arena."¹⁴

Although the Arbitration Agreement does not require administration by the AAA, the Defendants consistently have indicated their willingness to perform whatever formalities may be required by the AAA to have this dispute resolved in the arbitral forum that Plaintiff claims is demanded by the Arbitration Agreement. (R. pp. 609-610; R. p. 480) The Plaintiff cannot avoid her obligation to arbitrate by creating an artificial obstacle to the performance of her obligation. *See Tate v. Lemaster*, 231 S.C. 429, 99 S.E.2d 39 (1957) (recognizing general rule that a party to a contract cannot avoid its obligation upon the ground that the other party has not fulfilled a condition precedent to such liability when he himself has prevent such fulfillment); *Huffines Co. v. Lockhart*,

¹³ (R. p. 657)

¹⁴ (R. p. 657)

365 S.C. 178, 617 S.E.2d 125 (Ct. App. 2005) (party may not claim protection of a condition precedent which he prevents from occurring); *see also New Port Richey Medical Investors, LLC v. Stern*, 14 So.3d 1084 (Fla.App. 2 Dist. 2009) (holding that the parties' arbitration agreement is not rendered invalid or unenforceable simply because the AAA is unavailable to conduct the arbitration). Therefore, the Policy Statement does not preclude AAA administration of any arbitration of Plaintiff's claims, and the AAA is not "unavailable."

3. Administration by the AAA was not integral to the Arbitration Agreement, and a substitute arbitrator can be appointed.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. Congress contemplated the possibility that a designated arbitrator might not be available.¹⁵ Therefore, it enacted Section 5 of the FAA, which provides that "if for any other reason there shall be a lapse in the naming of an arbitrator . . . then upon application of either party to the controversy the Court shall designate and appoint an arbitrator . . . who shall act under the same force and effect as if he . . . had been specifically named therein." 9 U.S.C. § 5.¹⁶

¹⁵ As discussed previously, the Arbitration Agreement here does not require AAA to administer the arbitration and only requires a neutral arbitrator. And, even if it did require AAA administration, it is within the Plaintiff's power to submit her claims to the AAA for its administration of the arbitration. Accordingly, the agreement can be performed according to its terms and without the appointment of a substitute arbitrator.

¹⁶ *See also Reddam v. KPMG, LLC*, 457 F.3d 1054 (9th Cir. 2006) (arbitration agreement enforceable though named arbitrator will not administer arbitration); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217 (11th Cir. 2000) (compelling arbitration though designated arbitral forum no longer existed); *Trade & Transport, Inc. v. Natural Petroleum Charters, Inc.*, 931 F.2d 191, 194 (2nd Cir. 1991); *McGuire, Cornwell & Blakely v. Gilder*, 771 F. Supp. 319, 320 (D. Colo. 1991) (arbitration agreement enforceable though arbitral forum unwilling to arbitrate claims); *Zechman v. Merrill Lynch*, 742 F. Supp. 1359, 1365 (N.D. Ill. 1990); *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y. 1978) *aff'd* 578 F.2d 1366 (2d Cir. 1978).

The trial court relied on *Grant* to determine that a substitute arbitrator could not be appointed pursuant to Section 5 of the FAA. But the trial court's Order overlooks several significant differences between this case and *Grant*. First, in *Grant*, the arbitration agreement mandated administration by the National Health Lawyers Association (NHLA). There is no such strong pronouncement in the Arbitration Agreement here regarding the *administration* of the arbitration. As the *Grant* court emphasized, the parties there specified an *exclusive* arbitral forum. See *Grant*, 678 S.E.2d at 438-439 ("There is a dispute in the case law as to whether Section 5 [of the FAA] applies in cases where, as here, the parties have specified an exclusive arbitral forum...." and "We see great merit in the Second Circuit's view that Section 5 does not apply in cases where a specifically designated arbitrator becomes unavailable" and "...in our view, the specific designation of the AHLA as arbitrator is an integral term of this arbitration agreement."). Unlike *Grant*, the Arbitration Agreement here only requires that the parties use the AAA Rules and a "neutral arbitrator." It does not require AAA administration.

The trial court's conclusion that the provisions relating to the AAA Rules were integral parts of the agreement is simply conclusory and not supported by any evidence. In fact, the trial court's holding that the AAA provisions were integral to the Arbitration Agreement is directly contradicted by the testimony of Ms. Jenkins, who signed the Arbitration Agreement. She testified that she could not recall anything specific about the documents she signed (R. p. 640, page 13, lines 1-25) and that she could not remember if she even read the Arbitration Agreement (R. p. 640, page 14, lines 9-25). It is illogical to conclude that the AAA provisions were an integral portion of the arbitration agreement when the person who executed the documents does not recall reading *any* of the

agreement. *See, e.g., Stern*, 14 So.3d 1084 (substitute arbitrator provisions proper where plaintiff did not present any evidence that the choice of the AAA as the forum was an integral part of the agreement to arbitrate); *Deeds*, 141 P.3d 1079 (substitute provisions of FAA proper because there was no evidence that AAA provisions were central to the agreement to arbitrate because “the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration”); *Mathews*, 177 P.3d 867 (“Moreover, the record contains no evidence that an AAA arbitration panel was a significant or material term to [plaintiff] when she executed the Agreement.”); *Estate of Eckstein v. Life Care Ctrs. of Am., Inc.*, 623 F. Supp. 2d 1235, 1238 (E.D. Wash. 2009) (“Plaintiff has not convinced the Court that the designation of AAA as arbitrator was a material term.”); *Wiggins*, 2011 U.S. Dist. Lexis 103638 (holding that no evidence was presented that plaintiff was aware of the existence of the AHLA rules or possible conflict). Moreover, it is inconsistent for Plaintiff to refuse to submit her claim to the AAA, while at the same time claiming that the AAA was an integral part of the arbitration agreement.

D. The trial court erred in finding that the Defendants waived the right to enforce the arbitration agreement.

At the outset, the Defendants submit that once it has been determined that a valid arbitration agreement has been entered, the matter must be sent to arbitration. The arbitrator would then have the authority to rule on any defenses, such as waiver, that may be raised by the Plaintiff. Thus, the issue of waiver is not properly before this Court. Nonetheless, the Defendants will address the trial court’s Order, which held that the Defendants had waived their right to enforce the arbitration clause. This determination was in error.

A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Sanford v. South Carolina State Ethics Com'n*, 385 S.C. 483, 496, 685 S.E.2d 600, 607 (2009) (citing *Eason v. Eason*, 384 S.C. 473, 682 S.E.2d 804 (2009)). The three factors generally considered to determine if a party has waived its right to enforce arbitration include: (1) the time between commencement of the action and moving for arbitration; (2) whether the party seeking arbitration engaged in extensive discovery; and (3) prejudice to the non-moving party which must be more than mere inconvenience. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 126, 647 S.E.2d 249, 251 (Ct. App. 2007).

In this case, the Defendants have never acted in a manner contrary to their contractual right to arbitrate. The Defendants immediately raised arbitration in their Answers. The Defendants then challenged the Plaintiff's Motion to Strike the arbitration defenses. Thereafter, the Defendants conducted limited discovery for the express purpose of enforcing the arbitration agreement. The Defendants' conduct has been the *exact opposite* of a knowing and voluntary relinquishment of a known right.

The trial court's Order failed to consider several important facts with respect to the analysis of the time between commencement of the action and the motion to compel arbitration. First, the Complaint was filed on October 13, 2010. Although a Notice of Intent was filed earlier, the Defendants' contractual right to arbitrate was not breached until the Complaint was filed. Given the courts' policy to encourage settlement of

disputes through mediation,¹⁷ participating in a pre-suit mediation should not be held against the Defendants for purposes of calculating the time lapse between notice of a dispute and moving for arbitration. The only relevant date is the filing of the Complaint, which was the first time that Arbitration Agreement was breached.

Furthermore, *one week* after the Defendants answered the Complaints, the Plaintiff moved to strike the portions of the Defendants' Answers that raised arbitration as a defense. The trial court conducted a hearing on Plaintiff's Motion to Strike in February 2011 and denied the Motion to Strike by Order dated March 4, 2011. After the court denied the Plaintiff's Motion to Strike the arbitration defenses, the Defendants conducted limited discovery *solely* on the issue of arbitration, which included depositions of the individuals who signed the arbitration agreement. (R. p. 632, page 4, lines 12-21; R. p. 637, page 4, lines 12-23; R. p. 627, page 4, line 12—p. 628, page 5, line 20) The depositions occurred in May 2011 and after receiving the transcripts in July 2011, the Defendants moved to compel arbitration on August 4, 2011. Therefore, the lapse of time was less than ten months from the filing of the Complaint, and the justification for the passage of time was reasonable given that arbitration was immediately raised as an issue in Defendants' Answers and delay in conducting the limited discovery necessary to enforce the Arbitration Agreement was caused, in part, by the Plaintiff's Motion to Strike the arbitration defenses.

As to the issue of engaging in discovery, the Defendants only requested limited discovery on the issue of arbitration. The trial court's determination that the Defendants

¹⁷ See, e.g., *Cox & Floyd Grading, Inc.*, 356 S.C. 512, 516, 589 S.E.2d 789, 792 n.2 (Ct. App. 2003) (noting "the state's policy favoring alternative dispute resolution"); *Chester v. S.C. Dep't of Pub. Safety*, 388 S.C. 343, 346, 698 S.E.2d 559, 560 (2010) (noting state's "strong public policy favoring the settlement of disputes").

"decided to participate in procedural and discovery hearings" and "repeatedly availed themselves of the court system," is erroneous in that the Defendants appeared in court only to defend motions *filed by the Plaintiff*. As to the Defendants' production of documents, the trial court improperly punished the Defendants for *responding* to the *Plaintiff's* discovery requests. Because the Defendants limited *their* discovery to issues necessary to enforce the Arbitration Agreement, the trial court erred in ruling that the defendants had engaged in "extensive discovery." The Defendants' actions with respect to discovery were wholly consistent with their position that the Plaintiff's claims must be submitted to arbitration.

Finally, as to the issue of prejudice, the Court found that the only explanation for moving to compel arbitration when the Defendants did was to cause an "unnecessary delay and unfair prejudice to the Plaintiff." (R. p. 13) However, this conclusion is not supported by the record. Defendants raised the issue of arbitration in their Answers and attempted to follow a logical progression towards a motion to compel arbitration by conducting limited discovery on the arbitration issue after Plaintiff's Motion to Strike the arbitration defenses was finally resolved. After this limited discovery was conducted, the Defendants timely moved to compel arbitration. Defendants have engaged in no conduct in the litigation that is inconsistent with their position that Plaintiff's claims must be submitted to arbitration. Plaintiff cannot claim prejudice based on her own decision to conduct broad discovery knowing full well that her claim was subject to an Arbitration Agreement that Defendants indicated they intended to enforce. *See Rich v. Walsh*, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) (holding that mere delay, regardless of its duration, should not be considered as a factor independent of the actual prejudice it

occasions). Numerous South Carolina courts have addressed waiver issues and have rejected waiver defenses in cases similar to the present case. *See Gen. Equip. & Supply Co. v. Keller Rigging & Constr., Inc.*, 344 S.C. 553, 557, 544 S.E.2d 643, 645 (Ct. App. 2001) (finding an eight-month period where the "litigation consisted of routine administrative matters and limited discovery [that] did not involve the taking of depositions or extensive interrogatories" did not establish waiver); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Constr. Co.*, 355 S.C. 605, 612, 586 S.E.2d 581, 585 (2003) (finding a thirteen-month period in which discovery was limited in nature did not demonstrate waiver).

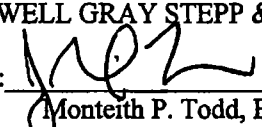
Conclusion

For the reasons set forth herein, the Court of Appeals should reverse the trial court's decision and remand the matter to the trial court for the entry of an order compelling arbitration.

Counsel for Appellants certifies that the Final Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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August 30, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
Court of Appeals Case No. 2012-207308

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones Respondent,
v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. Appellants.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
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Carmen J. Mullen, Circuit Court Judge

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Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation .. Appellants

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STATEMENT OF THE ISSUES ON APPEAL

- I. Whether the Circuit Court correctly refused to compel arbitration by following the controlling authority of *Grant v. Magnolia Manor-Greenwood*, and when an essential term of the agreement at issue here – the choice of the arbitral forum of the American Arbitration Association – failed and was unavailable?
- II. Whether the Circuit Court correctly refused to compel arbitration when the Appellant HHE waived any rights to pursue arbitration?
- III. Whether the Circuit Court correctly determined that the Arbitration Agreement at issue was unenforceable because it failed as a matter of contractual formation and did not involve interstate commerce?

STATEMENT OF THE CASE

Ms. Elizabeth Jones was admitted to Appellant Heritage Healthcare of Estill, LLC's ("HHE")¹ facility on April 18, 2007. (R. pp. 200-201). At that time of her admission Ms. Jones was fifty-nine (59) years old. The wrongful death and survival suits giving rise to this appeal allege that during Ms. Jones' residency at Appellant HHE's nursing facility, due to the negligence of the defendants, Ms. Jones' condition worsened, that she developed avoidable pressure sores that resulted in her leg being amputated, and that the defendants' negligence resulted in Ms. Jones' eventual death.

Respondent Cherry Scott, as personal representative of the Estate of Ms. Elizabeth Jones (hereinafter, "Scott"), filed separate Notices of Intent for wrongful death and survival actions in the Hampton County Court of Common Pleas on March 23, 2010. (R. pp. 39-88). Standard interrogatories and requests for production, along with Scott's responses to the same, were served along with the Notices of Intent. (Id.) The parties convened for a pre-suit mediation on September 10, 2010 with Bonum S. Wilson serving as mediator. Following the declaration of impasse at mediation, on October 13, 2010, suits for wrongful death and survival were filed in the Court of Common Pleas. (R. pp. 651-652; 89-110).

Appellant timely served Answers to the Complaints on November 24, 2010. Each answer included a qualified general denial and numerous affirmative defenses. (R. pp. 111-158). Relevant to this appeal, Appellant claimed that the suits were barred and subject to arbitration. (Id.) Immediately after receiving the Answers Scott moved to strike a number of defenses, including the arbitration defenses. (R. pp. 159-162). The

¹ Respondent adopts the use of "HHE" as the shorthand reference to all of the party Defendant/Appellants in the litigation.

trial court heard Scott's Motions to Strike on February 11, 2011 and denied Scott's motion to strike the arbitration defenses. (R. pp. 19-22).

After filing the lawsuits, Scott served discovery upon the Appellant on November 8, 2010. Appellant HHE requested and received from Scott an extension to respond to her discovery requests and partial responses. Defendant UHS Pruitt Corporation responded to Scott's first requests for production on December 21, 2010. On January 21, 2011, Defendants HHE, United Clinical Services, Inc., and United Rehab each responded in separate discovery responses to Scott's first requests to produce. On January 31, 2011, Defendant HHE served its Supplemental Response to Plaintiff's First Requests for Production, which included documents Bates stamped numbers 1 through 2297.

During this process, Scott was forced to file a Motion to Compel certain discovery responses from the Appellant on February 15, 2011. (R. p. 163). Appellant HHE appeared and defended Scott's motion to compel before the circuit court in a hearing on March 16, 2011. The parties worked out some of their issues, but the circuit court heard arguments and ruled on a number of discovery issues. (R. pp. 21-31). Furthermore, Appellants availed themselves of the Court's power, sought, and received a Confidentiality Agreement and Protective Order of the Court concerning documents produced in discovery. (R. pp. 32-38). At no time during this discovery process did Appellant HHE object to producing the information on the grounds that it might waive any rights to seek arbitration. On April 22, 2011, Defendant Jones served its Second Supplemental responses to Plaintiff's First Request for Production.

Not only did Appellant HHE respond to the discovery propounded by Scott, but HHE also engaged and participated in an extensive course of discovery concerning the

arbitration issues. On February 7, 2011, Appellant HHE served written discovery upon Scott, including some twenty (20) Requests for Production and seven (7) Interrogatories. Scott fully replied to these discovery requests in a timely fashion.

On May 5, 2011, Appellant participated in depositions related to the arbitration defense. HHE noticed and took the deposition of the personal representative of Ms. Jones' estate, Ms. Cherry Scott. Appellant also deposed Ms. Ellen Jenkins, one of Ms. Jones' other siblings who was involved in Jones' admission to the Appellants' facility. That same day Scott's counsel deposed Ms. Sally Dobson, the admissions director at HHE who participated in the admissions process for Ms. Jones at Appellant's facility.

Throughout the course of discovery in this matter, Appellant HHE has produced 6,211 pages of discovery documents to the Plaintiff. Furthermore, Appellant HHE participated in a second, failed mediation on August 11, 2011.²

On August 3, 2011, HHE moved for an order dismissing Scott's lawsuits and compelling arbitration. (R. pp. 165-186). The trial court held a hearing on HHE's motion on October 7, 2011, after which the court denied the motion by an Order of November 9, 2011. (R. pp. 1-14). Following the denial of its motion to compel arbitration HHE moved for reconsideration. The trial court denied HHE's motion for reconsideration by an Order entered January 18, 2012. (R. pp. 15-17). Appellant HHE's Notice of Appeal was filed on February 2, 2012. (R. p. 562).

STATEMENT OF THE FACTS

On April 18, 2007, Ms. Elizabeth Jones was admitted to the Defendant's facility from a local hospital. (R. pp. 200-206). Appellant HHE performed a pre-admission

² In Hampton County, and across the 14th Circuit, mediation is mandatory pursuant to Court order.

"Nursing Admission Assessment" that neither indicated cognitive disabilities nor in any way questioned Ms. Jones' mental status or competency. (R. pp. 200-201). The Nursing Admission Assessment showed Ms. Jones to be oriented to person, place, time, and current events. (R. p. 200). Ms. Jones was alert, cooperative, and exhibited clear speech. (Id.)

When Ms. Jones was transferred to the HHE facility, her sister Ellen Jenkins accompanied her. (R. p. 639). Ms. Jenkins has a tenth grade education. (R. p. 638). Ms. Jenkins met with the hospital's admissions director, Sally Dobson, and "signed in" her sister for therapy. (R. pp. 639-640.) Ms. Jenkins executed all of the documents at issue, including the Arbitration Agreement. At no time prior to or after Ms. Jones' admission did Ms. Jenkins ever hold a Power of Attorney for Ms. Jones. (R. p. 640). At the time of her admission, Ms. Jones had never executed any Power of Attorney authorizing action on her behalf. (Id). The admissions paperwork contained the separate, stand-alone Arbitration Agreement at issue. (R. pp. 653-654).

I. THE TRIAL COURT PROPERLY DENIED APPELLANT HHE'S MOTION TO COMPEL ARBITRATION PURSUANT TO *GRANT V. MAGNOLIA MANOR-GREENWOOD*.

Appellant's arguments that the circuit court erred in denying its Motion to Compel Arbitration lack merit in light of well-settled law concerning the interpretation of arbitration agreements as matters of contract, particularly the Supreme Court decision of *Grant v. Magnolia Manor-Greenwood*, 383 S.C. 125, 678 S.E.2d 425 (2009). The trial court's denial of arbitration is founded primarily upon the failure of the Agreement's chosen forum -- the American Arbitration Association ("AAA") -- to accept pre-dispute arbitration agreements in the field of health care disputes.

The court denied arbitration for three alternative reasons and found that: (1) pursuant to *Timms v. Greene*, 310 S.C. 469, 427 S.E.2d 642 (1993) the arbitration agreement itself does not involve interstate commerce; (2) the agreement fails as a matter of contract because there was no meeting of the minds between the parties; and, (3) that even if arbitration were available, by their conduct and participation before the court, Appellant HHE has waived any claim to arbitration.

The trial court's order is consistent with the Supreme Court's decision of *Grant, supra*, and no other issues must be addressed. However, even if review is expanded to the alternative grounds of denying arbitration, the Order should be affirmed. On each issue ruled upon, the trial court's findings and rulings conform to applicable principles of South Carolina law.

From the outset, it is important to note that the Appellant's reliance on the "presumption toward the arbitrability" of disputes is misplaced. As usually occurs when a party seeks to compel arbitration, the "presumption of arbitrability" phrase and the arguments that flow from it achieve talismanic importance in arguing for arbitration. In South Carolina, though, the presumption in favor of arbitration does not overcome the fact that such agreements are subject to common law rules of contract interpretation. Regardless of the Appellant's reliance upon the legislative and judicial presumption in favor of the arbitrability of disputes, South Carolina law clearly holds that our courts will not impose judicial re-writing of agreements to arbitrate. *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103,480 S.E.2d 81, 84 (1997) (citing *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)). Nor does the presumption of arbitration supplant common law notions of contractual

interpretation such as the requirement of the meeting of parties' minds in forming an agreement.

The Federal Arbitration Act itself acknowledges the underlying contractual basis of any arbitration agreement. Under the Federal Arbitration Act, the party seeking arbitration must show two things in order to compel arbitration: (1) that a *written agreement to arbitrate exists*, and (2) that the written agreement is contained within a contract involving interstate commerce. 9 U.S.C. § 2 (2006) (emphasis added). Section 4 of the FAA reads, in part, as follows:

The court shall hear the parties, *and upon being satisfied that the making of the agreement for arbitration or the failure therewith is not the issue*, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

9 U.S.C. § 4 (2006) (emphasis added).

Here, under the first prong concerning the existence of an agreement, the trial court ruled correctly that there was no contract. While the issues need not be reached due to the failure of the first test of the validity of the arbitration agreement, the trial court also ruled correctly under the second prong that the contract does not involve interstate commerce pursuant to 9 U.S.C. §2. The Arbitration Agreement at issue fails on all grounds addressed by the trial court.

A. Standard of Review

Determinations of arbitrability are subject to *de novo* review. *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (2002). Unless the parties provide otherwise, the question of arbitrability is an issue for judicial determination. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001).

Furthermore, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 664-665, 521 S.E.2d 749, 753 (Ct. App. 1999).

B. While Arbitration is Favored as a Matter of Policy, Questions Concerning the Enforceability of Arbitration Agreements Are Nevertheless Subject to General Principles of Contract Law.

Respondent fully acknowledges that the arbitration of disputes is favored as a matter of both state and federal legislative and judicial policy. The Courts of South Carolina have noted a "strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor the arbitration of disputes." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839 (Ct. App. 1999); *Toler's Cove Homeowners' Ass'n. v. Trident Construction Co., Inc.* 355 S.C. 506, 612, 583 S.E.2d 581, 585 (2003). With respect to the breadth of arbitration clauses and questions of whether a dispute is covered by the clause, unless a court can say with assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, generally arbitration will be ordered. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Yet, despite the existence of this presumption of favoring arbitration, courts are bound to interpret arbitration clauses within the familiar strictures of contractual interpretation. "Although [South Carolina Courts] are constrained to resolve all doubts in favor of arbitration, this is not an absolute truism intended to replace careful judicial analysis." *Chassereau v. Global Sun Pools, Inc.*, 373 S.C. 168, 172, 644 S.E.2d 718, 720 (2007). Arbitration agreements are still required to satisfy the basic tenets and requirements of contract law. *Towles*, 338 S.C. at 37, 534 S.E.2d at 844 (Ct. App. 1999).

"Arbitration is a matter of contract, and our evaluation of the enforceability of an arbitration agreement is guided by general principles of contract law." *Grant v. Magnolia Manor-Greenwood, Inc.*, *supra* (citing, *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001)). In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.' " *Towles*, 338 S.C. at 37, 524 S.E.2d at 844 (citing, *Johnson v. Circuit City Stores*, 148 F.3d 373 (4th Cir. 1998) (quoting, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 115 S. Ct. 1920, 131 L.Ed.2d 985 (1995))). "Arbitration is a matter of contract and controlled by contract law." *South Carolina Pub. Serv. Auth. v. Great Western Coal (Kentucky) Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993) (citing, 5 *Am.Jur.2d Arbitration and Award* §11 (1962)). "The Federal Arbitration Act recognizes that arbitration is strictly a matter of contract and that the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236 428 S.E.2d 709, 710 (1993) (citing *Volt Info Sys., Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1255, 103 L.Ed.2d 488, 500 (1989)). General contract principles of state law apply in a court's evaluation of the enforceability of an arbitration clause. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 542 S.E.2d 360 (2001).

In fact, strict construction of the plain terms of arbitration agreements was confirmed days ago by the United States Supreme Court. In *American Express Company, et al., v. Italian Colors Restaurant, et al.*, 570 U.S. ____ (Slip Opinion No.12-133, June 20, 2013), Justice Scalia, writing for the majority, wrote:

This text [9 U.S.C. § 2] reflects the overarching principle that arbitration is a matter of contract. (Citation omitted). And

consistent with that text, courts must "rigorously enforce" arbitration agreements according to their terms, *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213, 221 (1985), including terms that "specify with whom [the parties] choose to arbitrate their disputes," (citation omitted), and "the rules under which that arbitration will be conducted," *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U. S. 468, 479 (1989).

(Slip Opinion, p. 3.).

Under South Carolina common law, in order to have a valid and enforceable contract there must be a meeting of the minds between the parties to all essential and material terms of the agreement. *Player v. Chandler*, 299 S.C. 101, 108, 382 S.E.2d 891 (1989) (citing *Hughes v. Edwards*, 265 S.C. 529, 220 S.E.2d 231 (1975)). Moreover, the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate. *Dowling*, 311 S.C. at 236, 428 S.E.2d at 710.

Respondent does not ask this Court to ignore state and federal policies in favor of arbitration. Rather, Respondent asks this court to interpret the agreement between the parties based upon the plain language of the arbitration agreement itself and to resist HHE's invitation to judicially rewrite and author the contract beyond the terms chosen by the parties in the Arbitration Agreement. Respondent requests that this Court "rigorously enforce" the plain meaning of the Arbitration Agreement at issue. "The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997) (citing *Patterson v. Aetna Life Ins. Co.*, 248 S.C. 374, 378, 149 S.E.2d 915, 917 (1966)).

C. Even if the Arbitration Agreement Were Valid, the Parties to the Agreement Agreed To A Specific Arbitration Clause Stating That Any Arbitration "Shall Follow the Rules of the American Arbitration Association."

The Arbitration Agreement signed by Ms. Jenkins (purportedly on behalf of her sister)³ and HHE is not enforceable as a matter of contract. There is no dispute that the agreement at issue was prepared by HHE and calls for any "claim or claims" between the resident and HHE to be handled under the auspices of the American Arbitration Association (AAA). In this case, Appellant HHE drafted a standard form Arbitration Agreement which was executed at the same time of the larger packet of admissions documents to the facility. This Arbitration Agreement was provided to the decedent's sister to sign in the process of the decedent's admission to HHE's Estill facility.

Although this Court recognizes that parties are free to contract away their rights, it cannot be ignored that this "take-it-or-leave-it" contract was drafted by the superior party, the Appellant HHE. Appellant HHE, as the superior party and the drafter of this Agreement, chose the American Arbitration Association's rules as the governing guidelines for any arbitration with the resident. More importantly, Appellant was free to include any terms it desired concerning arbitration in their Arbitration Agreement and to present those same "take-it-or-leave-it" terms to all potential residents.

The arbitration agreement, entitled "Resident and Facility Arbitration Agreement," states in pertinent part as follows:

It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or "Authorized Representative," together referred to as the "Resident") that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies,

³ The agreement was not signed by the decedent/resident or anyone authorized to act on her behalf, addressed below.

claims, disputes, disagreements or demands of any kind (referred to as a "Claim" or "Claims") arising out of or relating to the Resident's Admission Agreement with the Facility (the "Admission Agreement") or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**. This means the parties are waiving their right to a trial before a jury or a judge.

* * *

Any arbitration proceeding that takes place under this **Arbitration Agreement** shall follow the rules of the American Arbitration Association ("AAA") and any resulting decision shall be enforceable by a court of competent jurisdiction. The **arbitration** shall be conducted where the Facility is located or as close to the Facility as practical. The arbitration proceeding shall be conducted before one neutral arbitrator selected in accordance with the rules of the AAA. The parties agree to bear their own attorneys' fees and costs associated with the arbitration proceeding.

(R. p. 653) (emphasis in original).

"Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). Courts are "not at liberty to consider the undisclosed or secret intentions of the parties but must be governed by their outward expressions." *Kable v. Simmons*, 217 S.C.161, 60 S.E.2d 79, 81 (1950). The Court is "without authority to alter a contract by construction or to make new contracts for the parties." *C.A.N. Enterprises, Inc. v. South Carolina Health & Human Servs. Fin. Comm'n.*, 296 S.C. 373, 378, 373 S.E.2d 584, 587 (1988) (citing *Gilstrap v. Culpepper*, 283 S.C. 83, 86, 320 S.E.2d 445 (1984)). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or failure to guard their rights

carefully." *Blakeley*, 266 S.C. at 73, 221 S.E. 2d at 769 (citing *McPherson v. J.E. Sirrine & Co.*, 206 S.C. 183, 33 S.E.2d 501, 509 (1945)).

Here, the agreement unambiguously and clearly states that any dispute arising between the parties shall be resolved in accordance with "the rules of the American Arbitration Association." The Appellant could have included conditional language or provided alternate administrators, rules, or forums but it did not. The Appellant could have added language providing for "fall back" procedures if the chosen forum would not allow arbitration. It did not.

Effective January 1, 2003, the AAA published a notification that it would not accept administration of cases involving individual patients without a post-dispute agreement to arbitrate such cases as the one before this Court. *See*, AAA Healthcare Policy Statement, January 1, 2003. (R. p. 657). This occurred *over four years* before HHE's form take-it-or-leave-it Arbitration Agreement was presented to the decedent's sister. The agreement drafted unilaterally by HHE includes the forum selection provision requiring adherence to the AAA rules. HHE knew or should have known the AAA's position on arbitrating health care cases involving individual patients long before the Agreement at issue was entered into. Because the AAA no longer arbitrates healthcare disputes arising under pre-injury arbitration agreements, the arbitration clause is therefore unenforceable.

D. The Appellant's Choice of Arbitral Forum Requiring Adherence to the AAA Rules is an Integral Part of the Agreement and the Failure of This Forum Nullifies the Arbitration Agreement.

The Arbitration Agreement in this case should not be enforced because there has been a failure of the arbitral forum. The Appellant's choice of the AAA as a forum

was an essential term of the arbitration agreement and the failure of the AAA to accept this type of case voids the Agreement. Appellant attempts to argue that the choice of "the rules of the" AAA does not constitute the failure of the arbitration forum and that another arbitrator could administer the arbitration under the chosen AAA rules. This argument is unavailing under applicable law and the plain language of the AAA rules and procedures.

Rule R-2 of the Commercial Arbitration Rules and Administrative Procedures of the American Arbitration Association provides as follows:

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authorities and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its officers.

(Emphasis supplied). See, <http://www.adr.org/sp.asp?id=22440>. Thus, by the plain and unmistakable language of the AAA – which the Appellant chose – "the agreement to arbitrate under these rules" directly appointments the AAA as the arbitral forum. The choice of these rules "authorize[s] the AAA to administer the arbitration." *Id.*

Rule R-3 refers to the National Roster of Arbitrators. This Rule provides:

The AAA shall establish and maintain a national roster of commercial arbitrators (National Roster) and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

Rule 3, AAA.

Rule R-49 addresses administrative fees and provides that "[a]s a Not-For-Profit Organization, the AAA shall prescribe an initial filing fee and a case service fee to compensate it for the costs of providing administrative services." Sub-paragraph C of Rule 51 addresses the neutral Arbiter's compensation and provides that: "Any arrangement" for the compensation of a neutral arbiter shall be paid through the AAA and not directly between the parties and the arbitrator. The American Arbitration Association Rules conclude by stating that:

These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Unauthorized use or modification of these rules may violate copyright laws and other applicable laws.

Rule R-49, AAA.

The American Arbitration Association also has a specific fee structure upon which the AAA charges the parties to administer the claims based on the amount of the claim and counterclaims. Initial filing fees range from Seven hundred fifty (\$750.00) dollars to Ten thousand (\$10,000.00) dollars, and the case service fee ranges from Two hundred (\$200.00) dollars to Four thousand (\$4,000.00) dollars. For any claims above Ten million (\$10,000,000.00) dollars, then the base fee is Twelve thousand, five hundred (\$12,500.00) dollars, plus .01% of the amount of the claim above Ten million (\$10,000,000.00) dollars, as well as a case service fee of Six thousand (\$6,000.00) dollars. Nothing in the AAA Rules addresses, authorizes, or even contemplates the application of its rules outside the scope of its own administration of arbitrations.

Finally, the specific, in-depth rules of the AAA apply to all disputes before it. AAA rules apply to the "initiation" of arbitration, service, and answering. AAA rules and

procedures direct the parties concerning the production of evidence, the production ("sharing" in AAA-speak) of documents before a hearing, the parties' ability to obtain discovery, communications with the AAA, form and manner of award, and every aspect involved in the arbitration process from the filing of an award through post award procedures. Therefore, a review of the AAA's Rules and Procedures weighs heavily against any argument by the Appellant that the application of the AAA's rules, based on the language of the Arbitration Agreement, do not rise to the level of selecting a failed forum for arbitration.

An understanding of the detailed, all-encompassing nature of the AAA rules is important to consider in light of *Grant v. Magnolia-Manor* and its analysis of whether the failure of the chosen arbitral forum voided a similar pre-injury arbitration agreement. In *Grant*, the Court's analysis centered upon whether the selection of a named arbitrator constituted an integral part of the arbitration agreement. "To determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the 'essence' of the arbitration agreement." *Grant*, (citations omitted). Under the Supreme Court's analysis, the rules of the forum chosen in *Grant* (the American Health Lawyers Association ("AHLA")) were not merely ancillary and logistical, but rather essential to the agreement. In arriving at the conclusion that the selection of the AHLA was an essential term of the arbitration agreement the Court stated:

Under the AHLA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of

arbitrators selected by the service. In our view, the parties waiver of this set of rights in agreeing to arbitrate before the AHLA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHLA "has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." (Citations omitted). Where designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, we believe that it is neither "logistical" nor "ancillary". (See *Smith v. Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 862 (4th Cir. 2000) ("It is far better to interpret the agreement based on what is specified, rather than attempt to incorporate other remote rules by reference."))

See, Grant. Simply put, the Supreme Court's analysis in *Grant* directly squares with the issues of the AAA before this Court. The detailed, intricate Rules and Procedures of the AAA cannot be deemed to be merely ancillary and logistical. These rules and procedures affect the substantive outcome of the resolution of the issues. Appellant HHE, the drafters of the Arbitration Agreement at issue, should have been aware that for approximately four (4) years prior to the decedent's sister's signature of this agreement, the rules and forum that it chose were no longer available as a means of dispute resolution. Furthermore, in choosing that forum, it is inconceivable that Appellants can now argue that the application of the intricate rules of the AAA to disputes do not have real, substantive effects on the rights of the parties. If not, why choose the AAA specifically? Because the AAA no longer accepts such pre-injury arbitration agreements, the failure of the arbitral forum renders the Arbitration Agreement at issue unenforceable.

Under the binding precedent of *Grant*, the circuit court's Order Denying Appellants' Motion to Compel Arbitration should be affirmed without the necessity of reaching the question of the application and effect of the Federal Arbitration Act. However, even if the FAA applies, the Court's refusal to appoint a substitute arbitrator is proper.

E. Due to the Failed Forum Selection Clause, No Substitute Arbitrator Can Be Appointed.

The Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq. (1999) codifies federal policy on arbitration and arbitration agreements. Unless the parties have contracted otherwise, the FAA applies in federal and state courts to any arbitration agreements regarding a transaction that involves interstate commerce, regardless of whether the parties contemplated an interstate transaction. *Munoz*, 343 S.C. at 538, 542 S.E.2d at 363. Even if the FAA applied to this arbitration clause and interstate commerce were involved, the trial did not err in refusing to designate a substitute arbitrator pursuant to § 5 of the FAA, because the arbitration agreement is void and unenforceable as a matter of law for the reasons previously stated.

Appellant relies on the mandatory language of §4 of the FAA to argue that the trial court was bound and required to enforce the Arbitration Agreement at issue despite the failure of an essential term of the agreement. As noted by Appellants, "where an arbitration agreement governed by the FAA covers claims that have been asserted in a lawsuit, the court having jurisdiction *must* compel arbitration." This argument simply ignores the applicable law and improperly seeks to elevate the presumption of arbitrability over the careful analysis the law requires of courts in determining the

validity of arbitration agreements. The relevant portion of Section 4 of the FAA provides:

[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Appellant then invokes the language of Section 5 of the FAA to argue that the unavailability of the AAA forum and rules is immaterial and that the court is required to appoint a substitute arbitrator. This argument is based upon the "lapse in the naming of an arbitrator" language of § 5. Section 5 provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

The plain language of §5 prevents its application in this instance. Here, there has not been a "lapse in naming an arbitrator." The parties specifically named an arbitral forum and set of rules, the AAA, that no longer accepts these disputes. Based upon the analysis under *Grant*, the provision did not merely "name" an arbitrator, but chose specific substantive, procedural, and administrative choices that formed an

essential element of the agreement to arbitrate. Therefore, this contract is unenforceable because a material part of the arbitration clause no longer exists.

While Appellant HHE cites several cases in which courts applied §5 to appoint a substitute arbitrator, these cases are countered by numerous decisions favorable to the Respondent's position.⁴ These same cases were considered by the Supreme Court in *Grant*, and that decision requires a finding by this Court that the selection of the AAA rules was the exclusive selection of a forum in the arbitration agreement. Because that forum fails, the arbitration agreement, as drafted, is unenforceable. Even if this Court were to reach the issue of whether Section 5 of the Agreement requires arbitration, which the *Grant* Court did not reach, those cases relied upon by Respondent are more persuasive and should be followed.

In *Smith Barney v. Critical Health Systems of North Carolina*, 212 F.3d 858, 860 (4th Cir. 2000), the arbitration agreement provided that arbitration would proceed in accordance with the rules of three self-regulatory organizations, the NASD, the NYSE and the AMEX. "Where the parties have agreed explicitly to settle their disputes before particular arbitration fora, that agreement must control. To hold otherwise would require us to impose a strained construction on a straightforward

⁴ See, *In Re: Solomon*, 68 F.3d 554 (2d Cir. 1995) (Where the Court concluded, in essence, that the language stating that the rules of the NYSE were to apply was the same as providing that the matter could only be arbitrated before the NYSE.); *Smith Barney, Inc. vs. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858, CA4 (N.C. 2000) (Where the Fourth Circuit, after conducting an exhaustive review of other decisions, concluded that there was no difference between an agreement that provided for arbitration "only before" specified entities and an agreement that provided for arbitration "in accordance with the rules" of several entities and holding that where parties agreed explicitly to settle their disputes before a particular arbitration forum, that agreement must hold); and, *Buice vs. WMA Securities, Inc.*, WL 6063508 (Ct. App. 10/14/08) (Upholding order denying arbitration where failure of forum occurred.)

agreement." *Id.* at 862 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 113 (2d Cir. 1990)).

Likewise, in *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F3d 554 (2d Cir. 1995) the arbitration clause provided that the parties arbitrate disputes before the NYSE. Defendants sought appointment of a substitute arbitrator under § 5 of the FAA when the NYSE declined to arbitrate the dispute. The Court stated that "although federal policy favoring arbitration obliges us to resolve any doubts in favor of arbitration, we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes only before the NYSE." *Id.* at 559. The Court in *Salomon* states that §5 of the FAA applies when there is a "lapse in the naming of an arbitrator... or in filling a vacancy." 9 U.S.C §5. Because the parties had contractually agreed that only the NYSE would arbitrate any disputes between them, and there was no lapse in naming or filing a vacancy, the Court declined to appoint substitute arbitrators and compel arbitration in another forum. *Salomon* at 559.

In the case before this Court, the "lapse" argument is not compelling as there was no lapse in naming an arbitrator or lapse in filling a vacancy. Furthermore, Appellant was aware before the presentation of this agreement to the decedent's family upon the admission Ms. Jones that the AAA would no longer arbitrate such disputes. If Appellant intended any other entity to arbitrate in place of the AAA or under its rules with a different arbitral forum, then they could have chosen to include appropriate language in their Agreement. As the superior, drafting party, this failure should be held against the Appellant HHE, rather than the Estate of Ms. Jones.

Similarly, any argument by HHE that the FAA would somehow force the Personal Representative of Ms. Jones' Estate to now execute a "post-injury" arbitration agreement is untenable. There is absolutely no authority for this. This cannot be the purpose of the Federal Arbitration Association, and to require such would allow parties who have failed in the construction of contracts, specifically arbitration agreements, to force the same result by after the fact, imposed modification. At its core, arbitration agreements are based upon the meeting of the minds and intentions of the parties. To argue that the Personal Representative is now compelled to enter into an agreement flies in the face of logic and the will and intent of parties to contract and make agreements.

II. APPELLANT HHE HAS WAIVED THE RIGHTS TO ENFORCE THE ARBITRATION AGREEMENT EVEN IF IT WERE VALID.

HHE has waived any right to seek arbitration. In South Carolina, parties can waive their right to enforce an arbitration agreement. *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 521 S.E.2d 749 (Ct. App. 1999). Three factors generally are considered to determine if a party has waived its right to enforce an arbitration clause: 1) the time between commencement of the action and moving for arbitration, 2) whether the party seeking to compel arbitration engaged in discovery before moving for arbitration, and 3) prejudice to the non-moving party which must be more than mere inconvenience. *Rhodes v. Benson Chrysler-Plymouth, Inc.*, 374 S.C. 122, 647 S.E.2d 249 (Ct. App. 2007).

The trial court correctly found that that Appellant HHE waived their rights to mediation. These proceedings were commenced by filing two Notices of Intent that were served on the Defendants on or about April 7, 2010. (R. pp. 39-88). A nursing home negligence action cannot be commenced until the Plaintiff has filed and served a Notice

of Intent. See S.C. Code Ann. § 15-79-125. Appellant HHE could have moved at that point to move to compel arbitration. In fact, S.C. Code § 15-79-120 specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. Instead, Appellant participated in the Notice of Intent proceedings, attended a failed mediation, and the summonses and complaints were filed on October 13, 2010. HHE's motion was not filed until August 4, 2011. During that long delay, HHE engaged in discovery. Appellant has served and answered discovery, though they have attempted to limit that discovery only to "arbitration" issues. HHE has taken and defended depositions. Not only did HHE participate in the pre-suit mediation on September 10, 2010, but also a second mediation on August 11, 2011. Throughout this time frame HHE has also participated in procedural and discovery hearings before the trial court, rather than moving to compel arbitration. In fact, Appellant HHE has produced 6,211 pages of discovery documents during the course of this litigation. HHE has repeatedly availed itself of the court system since April of 2010.

Clearly, in South Carolina, the "right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011). Our Courts have held that less time constitutes waiver. *Rhodes*, 374 S.C. at 125, 128 647 S.E.2d at 250, 252 (Ct. App. 2007). This Court recently addressed the waiver of arbitration in *Carlson v. S.C. State Plastering, LLC*, (Ct. App. Opinion No. 5143, June 12, 2013). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). The question of whether waiver exists is a fact based analysis based on the facts of each particular case. *Carlson*, p. 5.

Carlson reinforces the three factors to consider when determining whether a party has waived its right to compel arbitration: (1) whether a substantial length of time transpired; (2) whether the party seeking to compel arbitration engaged in extensive discovery; and, (3) whether the non-moving party was prejudiced by delay in seeking arbitration. *Id.*, citing *Davis v. KB Home of S.C., Inc.*, 394 S.C. at 131, 713 S.E.2d at 807.

Unlike the factual situation in *Carlson*, in this case – without question – HHE participated in extensive discovery. The parties have conducted extensive written and deposition discovery, participated in two mediations, and attended multiple Court hearings. The costs associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). The Estate has borne the costs of two failed mediations. Most prejudicially, now the respondent faces years of appellate wrangling and delay before she can finalize discovery and prepare for trial. At least if HHE had moved in a timely manner, these issues might have been resolved by this point. Appellant HHE has availed itself of the courts and delayed pursuing purported rights to arbitration. The trial court properly denied HHE's request on this ground alone.

III. AS A MATTER OF CONTRACT, THE ARBITRATION AGREEMENT FAILS AND IS INVALID BECAUSE THERE IS NO MEETING OF THE MINDS BETWEEN THE PARTIES.

In order to have a contract, there must be a meeting of the minds as to essential parts of the contract. *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891 (1989). Here, there is no meeting of the minds as to what the parties were entering into.

The admission director for HHE, Appellant's agent in the admissions process and who is charged with securing signatures including the Arbitration Agreement at issue, was Ms. Sally Dobson. Ms. Dobson described her role and responsibilities in the admissions process as follows:

A: I am the admissions director. I take referrals from the hospital or from home. We go over them, we check the pay sources, and then if we can help these people or can admit them for care then we do the process of admitting.

Q: Okay. What is your involvement in the actual admission process itself?

A: I sign - I have the paperwork signed by either the patient or a family member.

(R. pp. 633).

Ms. Dobson further testified that she and the administrator explain to residents and family members that arbitration means that if "they have any complaints or any concerns that are not being taken care of in a timely manner then we can go into arbitration." (Id). When asked if she was aware that the arbitration agreement required adherence to the AAA rules, she testified as follows:

Q Did you know, Ms. Dobson, that the Arbitration Agreement that we're here about today contains a provision that the American Arbitration Association rules have to be followed? Were you aware of that?

A If it's on that sheet of paper, Well, I don't know what the Arbitration Agreements are.

Q Well, how is it if you don't know, how would a resident know or their family member?

A I don't know.

Q Well, don't you think that's an important part of it?

A It is.

Q It's a material part of the contract?

A It is.

Q And but you don't know what it is?

A But I don't know what it is.

Q And so you can't expect a resident to know?

A That's --

MR. RISSLER: Object to the form.

A -- correct.

Q or their personal representative?

A Uh-huh (affirmative).

Q Right?

A Right.

Q Or power of attorney, right?

A Right.

Q Or their family member?

A Right.

(R. p. 634).

Astoundingly, the person HHE selected as the person to instruct residents and family members on the documents that they must sign in order to be admitted to the facility does not know what those very documents mean. Quite candidly, she further admitted that there could be no meeting of the minds as to an integral part of the contract.

(Id). Accordingly, there is no meeting of the minds and the arbitration agreement must fail.

The trial court was also correct in denying the motion to compel based upon the lack of standing of Ms. Jenkins, the decedent's sister, to enter into the agreement on her sister's behalf. The arbitration agreement here fails as a matter of simple contract. The trial court correctly ruled that the Arbitration Agreement fails for lack of standing by one of the parties thereto. On the date of Ms. Jones' admission, the nursing home staff performed an evaluation and found her to be mentally competent. (R. pp. 655-657). Though there was absolutely no impediment to Ms. Jones addressing the admissions process on her own, HHE's staff failed to obtain her consent to the terms of the Arbitration Agreement. Instead, HHE's staff had her sister, Ms. Ellen Jenkins, sign the Arbitration Agreement. Ella Jenkins did not have a Power of Attorney from Ms. Jones or any other legal basis to enter into this agreement.

There is no evidence that Ms. Jenkins had the authority to bind her sister to the Arbitration Agreement. However, HHE argues that such standing exists under the guise of "apparent authority." This is *post hoc* logical fallacy in the purest sense. Appellant HHE's employees and agents made a mistake in allowing a family member, with no legal standing or representative capacity, to sign admissions paperwork when Ms. Jones was perfectly competent to do so. This is a likely result when the facility's admissions director demonstrates an utter lack of understanding of legal representation. Consider the following candid response by Sally Dobson, the admissions director, when asked about requirements for admission:

Q: Are you aware of any legal requirements that must be met, for example, for me [Counsel for the Estate] to admit Mr. Rissler [Counsel for Appellant HHE] to the nursing home?

A: No.

(R. p. 633). This witness is HHE's agent and employee assigned to assist residents and their family members in the admissions process, the same who has no idea what arbitration is.

Furthermore, there is no evidence that Ms. Jenkins had the apparent authority to enter in the Arbitration Agreement. Whether an agency relationship exists is a question of fact to be determined by the relation, the situation, the conduct, and the declarations of the party sought to be charged as principal. *American Fed. Bank, FSB v. Number One Main Joint Venture*, 321 S.C. 169, 467 S.E.2d 439 (1996); *Hinson v. Roof*, 128 S.C. 470, 122 S.E. 488 (1924). It is the duty of an entity dealing with an agent to use due care to ascertain the full extent of the agent's authority. *Frasier v. Palmetto Homes of Florence*, 323 S.C. 240, 473 S.E.2d 865 (Ct. App. 1996). Moreover, under an "apparent agency" theory, while the admissions director might have mistakenly believed that Ms. Jenkins had the authority to enter certain health care or finance-related decisions by virtue of her being the decedent's sister, there is no evidence that Sally Dobson reasonably understood Jenkins to have authority to enter the stand-alone, separate Arbitration Agreement at issue.

Next, HHE argues that the Arbitration Agreement must be enforced because Ms. Jones was the "third party beneficiary" of the admissions agreement signed by Ms. Jenkins. These arguments lack merit. Even if Ms. Jones were the third party beneficiary of the *admissions* agreement, the benefits gained under that agreement are completely

and totally separate from the *Arbitration Agreement* at issue. HHE does not contend that the signing of the Arbitration Agreement was a condition precedent to Ms. Jones' admission to its facility or integral to her being admitted; if so, such agreement would be unconscionable. Rather, even if Ms. Jones did receive the benefits of health care through the admission agreement, these benefits stand separate and apart, and are completely severable, from the Arbitration Agreement.

Finally, HHE's argument that the personal representative should be equitably estopped from disavowing the arbitration agreement lack merit. HHE argues that a "nonsignatory is estopped from refusing to comply with an arbitration clause 'when it receives a direct benefit from a contract containing an arbitration clause.'" *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 416-17 (4th Cir. 2000)). *Id.* (quoting *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999)). "Generally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract." *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3d Cir. 2001) (citing *Tencara Shipyard*, 170 F.3d at 353 (finding non-signatory derived benefit from contract and could not avoid the arbitration clause contained therein)).

These cases are inapposite to the facts at hand. Neither Cherry Scott, as personal representative of Jones' estate, nor Ms. Jenkins as signatory, nor decedent Ms. Jones, have derived any benefit from the Arbitration Agreement. They have never sought to enforce any right, benefit, or privilege under the Arbitration Agreement. This Arbitration Agreement stood alone, separate, and apart from the admissions agreement and contract.

Appellant HHE can point to no benefit derived from the Arbitration Agreement by the decedent or her representatives.

IV. EVEN IF THE ISSUE OF INTERSTATE COMMERCE UNDER THE FAA IS REACHED, UNDER *TIMMS V. GREENE*, APPELLANT'S ARGUMENTS FAIL, AS INTERSTATE COMMERCE IS NOT EVIDENCED IN THE AGREEMENT.

The Arbitration Agreement of the parties is not a transaction involving interstate commerce. This issue was addressed long ago by the South Carolina Supreme Court in the case of *Timms vs. Greene*, 310 S.C. 469, 427, S.E.2d 642 (1993).

Timms stemmed from a nursing home resident's lawsuit seeking damages for injuries sustained while she was left unattended under a hair dryer at defendant's facility. The arbitration agreement in *Timms* required submission of any dispute to binding arbitration. The *Timms* defendant argued that interstate commerce was involved in the contract because the defendant was a division of a national corporation; the defendant hired employees from out of state; the defendant marketed its services out of state; the defendant purchased majority of its goods and equipment from out of state; and, the defendant contemplated payments from Medicare and Medicaid. The lower court found the contract did not involve interstate commerce, rendering the FAA moot. The Supreme Court affirmed. The Court in *Timms* stated "although these factors could evidence the center's involvement in interstate commerce we find that their relationship to the agreement between the center and the respondent is insufficient to form the basis of a contract between the parties." *Id.*

Interstate commerce is a necessary basis for the application of the FAA. Because interstate commerce was absent in the contract between *Timms* and the defendant, the Supreme Court refused to require arbitration because the Plaintiff's cause of action was

not subject to the Arbitration Act of South Carolina and the Federal Arbitration Act was inapplicable.

In this case, there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties.⁵ The contract was entered into between Ms. Jenkins, a South Carolina resident, and Heritage Healthcare of Estill, LLC, a South Carolina LLC. Furthermore, there has been no showing by HHE of any interstate commerce between the parties to the arbitration agreement. Furthermore, HHE's reference to involvement of Georgia corporations as parties to this lawsuit does not support a finding that the arbitration agreement itself involves interstate commerce. Clearly, the agreement *itself* is the focus of the inquiry under *Timms*. Within its four corners, the Arbitration Agreement at issue does not mention any of the out of state entities. Rather, the agreement specifically limits arbitration to disputes involving the resident and the "facility." (R. pp. 653-654). The "facility" is HHE, d/b/a Heritage of the Low Country. There is no evidence that Ms. Jenkins knew or should have known of the existence of the out-of-state corporations at the time she entered into this admission agreement. Additionally, the responsive pleadings of the out of state corporations deny that they are responsible for the care provided at the HHE facility. (R. pp. 112; 118; 124; 130; 136; 142; 148; and 153). There is no signed arbitration agreement or any other contract signed by the decedent and

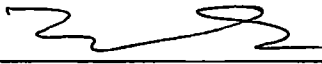
⁵ The trial court found correctly that parties cannot simply stipulate to the involvement of interstate commerce. It is well-established that parties cannot stipulate to subject matter jurisdiction before Courts. Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 262 S.E.2d 921 (1980). It is not enough to say interstate commerce is involved; it must be evidenced in the contract itself. *Timms, supra*. The trial court properly concluded that it should not relinquish its jurisdiction and authority to hear the dispute merely because of a contract term.

UHS Pruitt, United Rehab and/or United Clinical Services. Accordingly, the FAA does not apply.

CONCLUSION

The trial court properly concluded that *Grant v. Magnolia Manor-Greenwood* is dispositive of the issues of arbitrability in this case and refused to compel arbitration. Furthermore, even if Grant does not end the analysis, Appellant HHE waived any rights to claim arbitration by participating in this litigation for the length of time and to the extent which is availed itself of the court system. Finally, the Arbitration Agreement fails as a matter of contract and the FAA is not triggered by the involvement of interstate commerce within the Arbitration Agreement itself. For these reasons, the trial court's Order Denying Appellant HHE's Motion to Compel Arbitration should be affirmed.

Respectfully submitted,



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Ridgeland, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492

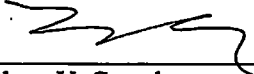
Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones.....Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation Appellants.

RESPONDENT'S CERTIFICATION OF COMPLIANCE WITH RULE 211(B),
SCACR

I, the undersigned, as counsel for the Respondents, hereby certify that the within
Final Brief of the Respondents complies with Rule 211(b) of the South Carolina
Appellate Court Rules.


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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case Nos. 2010-CP-25-491 and 2010-CP-25-492
South Carolina Court of Appeals No. 2012-207308

CHERRY SCOTT, as Personal Representative of the Estate
of ELIZABETH JONES, Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a
Heritage of the Lowcountry and/or Uni-Health Post Acute
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION, Appellants.

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SC Court of Appeals

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INTRODUCTION

The parties are in agreement regarding much of the law governing the "Resident and Facility Arbitration Agreement" ("Arbitration Agreement"), including:

- that Ellen Jenkins executed the Arbitration Agreement on behalf of Elizabeth Jones (*see* Appellants' Brief at 2-3; Respondent's Brief at 5);
- that federal and state legislative and judicial policies favor arbitration of disputes (*see* Appellants' Brief at 8-9; Respondent's Brief at 8); and
- that ordinary principles of State contract law govern formation and interpretation of the Arbitration Agreement (*see* Appellants' Brief at 11, 25; Respondent's Brief at 9-10).

Defendants seek to enforce the Arbitration Agreement according to its precise terms and the provisions of the Federal Arbitration Act ("FAA"), the law that the parties agreed would govern enforcement of the Arbitration Agreement. Plaintiff seeks to avoid her contractual obligation to arbitrate by:

- ignoring the parties' agreement that their transaction involved interstate commerce and that the FAA applied and Plaintiff's own allegations of interstate commerce (*see* Appellants' Brief at 4-8; Respondent's Brief at 30-32);
- challenging Ms. Jenkins's authority to execute the Arbitration Agreement on behalf of Ms. Jones despite Plaintiff's own testimony that Ms. Jones expressly authorized Ms. Jenkins to admit her to Heritage of the Lowcountry and that Ms. Jones accepted the benefits of the contracts entered into by Ms. Jenkins on her behalf (*see* Appellants' Brief at 11-15; Respondent's Brief at 27-30);
- arguing that there was no "meeting of the minds" despite the existence of an unambiguous written contract, the Arbitration Agreement, setting forth the respective contractual obligations of the parties (*see* Appellants' Brief at 15-17; Respondent's Brief at 24-27);
- using the AAA Healthcare Policy Statement to suggest an interpretation of the Arbitration Agreement that is contrary to the plain meaning of the Arbitration Agreement and that cannot be reconciled with the express terms of the Arbitration Agreement or the rules for interpretation of contracts; arguing that the effect of the AAA Healthcare Policy Statement is to render the AAA "unavailable" despite the absence of any evidence

that the AAA has refused or would refuse to accept Plaintiff's claims for arbitration and language in the AAA Healthcare Policy Statement indicating that the AAA would administer an arbitration of Plaintiff's claims; and arguing that Section 5 of the FAA would not require the appointment of a replacement arbitrator even though there is no evidence that the AAA was integral to the Arbitration Agreement (Appellants' Brief at 17-25; Respondent's Brief at 11-22); and

- arguing that Defendants have waived their right to enforce the Arbitration Agreement simply by responding to Plaintiff's use of the court system and engaging in limited discovery targeted solely at enforcement of the Arbitration Agreement, even though Defendants asserted the Arbitration Agreement as a defense in their initial pleadings (Appellants' Brief at 26-29; Respondent's Brief at 22-24).

For these reasons, and as shown more fully below, the arguments raised by Plaintiff should be rejected, and the trial court's order should be reversed.

ARGUMENTS

I. The Federal Arbitration Act applies because the transaction involved interstate commerce.

Plaintiff contends that "there is no evidence of interstate commerce in the actual Arbitration Agreement between the parties." (Respondent's Brief at 31.) Contrary to Plaintiff's assertion, the parties specifically acknowledged in the Arbitration Agreement that their transaction involved interstate commerce and would be governed by the FAA:

The Resident and the Facility acknowledge and agree that the Resident's Arbitration Agreement effects a transaction involving interstate commerce, therefore the enforcement of this Arbitration Agreement shall be governed by federal law, specifically, the Federal Arbitration Act, notwithstanding any contrary provision of the Admission Agreement or state law.

(R. p. 654, ¶ 5) This agreement is sufficient evidence of a transaction between the parties involving interstate commerce. (See Appellants' Brief at 5-6.) Moreover, Plaintiff's Complaint, on its face, establishes interstate commerce in that Plaintiff contends that

entities outside of South Carolina were involved with and responsible for care delivered at the nursing facility in South Carolina. (*See* Appellant's Brief at 7-8.)

Plaintiff seeks to equate the acknowledgment of a transaction involving interstate commerce to a stipulation regarding subject matter jurisdiction. (Respondent's Brief at 31, n.5.) Plaintiff makes no attempt to explain how an acknowledgment of interstate commerce is the equivalent to a stipulation of subject matter jurisdiction or to distinguish the numerous cases in which courts have relied upon a stipulation of interstate commerce to determine that the FAA applies. (*See* Appellants' Brief at 6, notes 4-5.) Rather, Plaintiff offers the conclusory assertion that:

Similarly, parties cannot "stipulate" to interstate commerce that would invoke the FAA and deprive the Courts of jurisdiction over disputes. "Like the construction of a contract, it is improper subject for stipulation and any attempted stipulation is not binding on a court." *Morris v. Beacham*, 274 S.C. 320, 262 S.E.2d 921 (1980).

(Respondent's Brief at 31, n.5.) *Morris* does not hold that whether a transaction involves interstate commerce or whether the FAA applies "is improper subject for stipulation" as Plaintiff suggests; rather, the "improper subject for stipulation" there was whether "the instrument in question created enforceable charitable trusts." *Morris*, 274 S.C. at 322, 262 S.E.2d at 922. *Morris* is inapposite to the issue of whether the FAA applies and in no way contradicts the numerous decisions in which courts have relied on the parties' acknowledgment of interstate commerce to determine that the FAA applies.

II. Ms. Jenkins was authorized to execute the Arbitration Agreement on behalf of Ms. Jones.

Plaintiff argues that Ms. Jenkins lacked "standing" to execute the Arbitration Agreement on behalf of Ms. Jones, arguing that "[t]here is no evidence that Ms. Jenkins had the authority to bind her sister to the Arbitration Agreement." (Respondent's Brief at

27.) This assertion ignores the evidence that Ms. Jones specifically authorized Ms. Jenkins to negotiate her admission to Lowcountry without placing any limitation on this authority, including Plaintiff's own testimony that Ms. Jones authorized Ms. Jenkins to act on her behalf. (See Appellants' Brief at 11-12.)

Plaintiff further seeks to avoid Ms. Jones's ratification of the agreements entered into on her behalf by Ms. Jenkins and her status as an intended third-party beneficiary of these contracts by arbitrarily seeking to divorce the Arbitration Agreement from the remainder of the contracts signed by Ms. Jenkins under the express authority granted her by Ms. Jones. (Respondent's Brief at 28-30.) Plaintiff's contention, in essence, is that Plaintiff can accept the benefits of a contractual relationship and unilaterally reject those portions of the contractual relationship that she later finds disadvantageous. The Arbitration Agreement was entered into in connection with Ms. Jones's admission to Lowcountry and explicitly references the Admissions Agreement. (R. p. 653) There was no reason for the parties to enter into an Arbitration Agreement outside of this admission. The Arbitration Agreement does not become wholly unrelated to the Admission Agreement simply because it was optional.¹ See *McCutcheon v. THI of S.C. at Charleston, LLC*, 2011 U.S. Dist. Lexis 144288 at *7 (D.S.C. 2011) ("Here, the Arbitration Agreement and Admissions Agreement, while separate documents, were

¹ A rule that an arbitration agreement becomes unrelated to the underlying transaction simply because the company offers its consumers a choice of whether to elect arbitration will likely result in less voluntary arbitration agreements and more mandatory arbitration agreements, depriving consumers of choice in dispute resolution options. Moreover, a rule that an arbitration agreement becomes unrelated to the underlying transaction because it is offered in a separate document rather than as a clause within the underlying contract will likely result in companies moving arbitration agreements into clauses within the underlying contract, potentially making it more difficult for consumers to learn that they are agreeing to arbitration of disputes.

executed by the same parties, at the same time, and regarding the same transaction; therefore, they constitute the entire agreement between the parties.”) (citing *Klutts Resort Realty, Inc. v. Down'Round Dev. Corp.*, 268 S.C. 80, 232 S.E.2d 20, 24 (S.C. 1977) (“The general rule is that, in the absence of anything indicating a contrary intention, where instruments are executed at the same time, by the same parties, for the same purpose, and in the course of the same transaction, the courts will consider and construe the instruments together. The theory is that the instruments are effectively one instrument or contract.”)). Ms. Jones (and those acting on her behalf) cannot accept the benefits of the Admission Agreement executed by Ms. Jenkins and then unilaterally ignore the Arbitration Agreement that was executed by Ms. Jenkins in connection with the Admissions Agreement. (See Appellants’ Brief at 13-14.)

Plaintiff contends that she should not be equitably estopped from disavowing the Arbitration Agreement because “Appellant HHE can point to no benefit derived from the Arbitration Agreement by the decedent or her representatives.” (Respondent’s Brief at 30.) Again, Plaintiff’s arguments conveniently ignore that the Arbitration Agreement was not entered into independently of the other admission contracts and would serve no purpose outside of the context of the other admissions contracts. Ms. Jones received the benefits of the Admissions Agreement that was the transaction underlying the Arbitration Agreement and, for that reason alone, should not be permitted to avoid the Arbitration Agreement. It is not necessary that Ms. Jones avail herself of the Arbitration Agreement in order to have ratified the Arbitration Agreement or to be bound as a third-party beneficiary or to be estopped from disavowing the Arbitration Agreement, so long as she accepted the benefits of the underlying transaction. See *Southern Bell Telephone &*

Telegraph Co. v. WRNO, Inc., 216 S.C. 533, 535-36, 59 S.E.2d 146, 147-48 (1950) (“If the appellant ratifies in part, it ratifies the whole.”); *McCutcheon*, 2011 U.S. Dist. Lexis 144288 at *8-9 (enforcing separate arbitration agreement under equitable estoppel and third-party beneficiary theories based on benefits conveyed under separate admissions agreement); *THI of S.C. at Columbia, LLC v. Wiggins*, 2011 U.S. Dist. Lexis 103638 at *16-21 (D.S.C. 2011) (enforcing arbitration provision under equitable estoppel and third-party beneficiary theories); *Cook v. GGNSC Ripley, LLC*, 786 F. Supp. 2d 1166, 1171-72 (N.D. Miss. 2011) (holding arbitration agreement in contract for nursing home care was enforceable against third-party beneficiary and her estate under third-party beneficiary principles); *Owens v. Coosa Valley Health Care, Inc.*, 890 So. 2d 983 (Ala. 2004) (same); *Trinity Mission Health & Rehab. v. Scott*, 19 So. 3d 735 (Miss. Ct. App. 2008) (same). Moreover, in addition to the benefits to Ms. Jones flowing from the Admissions Agreement, Ms. Jones and her representatives received the benefit, under the Arbitration Agreement, of being able to enforce the Arbitration Agreement to compel Defendants to arbitrate.

III. The unambiguous written terms of the Arbitration Agreement demonstrate a “meeting of the minds.”

Plaintiff contends that Sally Dobson, Lowcountry’s admissions director, “admitted that there could be no meeting of the minds as to an integral part of the contract.” (Respondent’s Brief at 27.) Plaintiff focuses on Ms. Dobson’s lack of familiarity with the rules applicable to any arbitration which might take place under the Arbitration Agreement (Respondent’s Brief at 25-27.) even though it is undisputed that Ms. Dobson did not discuss the applicable rules with Ms. Jenkins or Ms. Jones (R. p. 634, page 11, lines 10-22; R. p. 640, page 14, lines 13-18) Plaintiff ignores that Ms.

Dobson explained that the information that she does provide to individuals signing the Arbitration Agreement is wholly accurate and consistent with the written Arbitration Agreement: "When they sign the Arbitration Agreement, that [waives] their right to a jury trial or, you know, having it in court.... They are informed of this whenever they are there to sign." (R. p. 633, page 8, lines 9-14)

There is no evidence of a failure of the parties to agree to essential contractual terms. To the contrary, the Arbitration Agreement is a written contract that fully sets forth the parties' respective rights and obligations. There are no essential terms missing. Accordingly, there was a meeting of the minds with respect to the Arbitration Agreement. (See Appellants' Brief at 15-17.)

IV. The AAA Healthcare Policy Statement does not render the parties' agreement unenforceable.

The requirement in the Arbitration Agreement that any arbitration "shall follow the rules of the American Arbitration Association ('AAA')" does not render the Arbitration Agreement unenforceable because: (i) this provision does not require administration by the AAA (*see* Appellants' Brief at 18-21);² (ii) even if it did require administration by the AAA, the AAA is not "unavailable" (*see* Appellants' Brief at 21-23); and (iii) if AAA administration is required and the AAA is unavailable, a substitute arbitrator must be appointed pursuant to Section 5 of the FAA (*see* Appellants' Brief at 23-25).

² Plaintiff mistakenly claims that "[t]here is *no dispute* that the agreement at issue that the agreement at issue was prepared by HHE and calls for any 'claim or claims' between the resident and HHE to be handled *under the auspices of the American Arbitration Association (AAA)*." (Respondent's Brief at 11 (emphasis added).) The Arbitration Agreement requires that "any arbitration ... shall follow the rules of the [AAA]." (R. p. 653, ¶ 2) It does not require that any arbitration be administered by or "under the auspices of" the AAA.

A. Application of ordinary contract principles requires enforcement of the Arbitration Agreement.

Plaintiff relies upon *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 425 (2009), in which the Supreme Court affirmed a trial court's refusal to enforce an arbitration agreement based on the unavailability of the designated forum. However, as that case indicates, arbitration agreements are matters of contract and, therefore, each arbitration agreement must be interpreted according to its own terms. *Grant*, 383 S.C. at 130, 678 S.E.2d at 438. The Arbitration Agreement here is significantly different from the agreement in *Grant*. Interpreted in accordance with general principles of contract interpretation, the Arbitration Agreement does not mandate the use of an exclusive forum and is enforceable in accordance with the precise terms used by the parties.

"The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract." *Dobyns v. South Carolina Dept. of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (1997). "Where a contract is unambiguous, clear and explicit, it must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary, and popular sense." *Warner v. Weader*, 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983). "Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail. [Cit.] In construing terms in contracts, this Court must first look at the language of the contract to determine the intentions of the

parties. [Cit.] When a contract is unambiguous, clear and explicit, it must be construed according to the terms the parties have used, to be taken and understood in their plain, ordinary and popular sense. [Cit.] Extrinsic evidence giving the contract a different meaning from that indicated by its plain terms is inadmissible. [Cit.]” *C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 377-78, 373 S.E.2d 584, 586 (1988).

The Arbitration Agreement provides, in pertinent part, as follows:

It is hereby understood and agreed by Heritage of the Low Country and Ellen Jenkins and or “Authorized Representative,” together referred to as the “Resident”) that, regardless of any other agreement or understanding between the Facility and the Resident, any and all controversies, claims, disputes, disagreements or demands of any kind (referred to as a “Claim” or “Claims”) arising out of or relating to the Resident’s Admission Agreement with the Facility (the “Admission Agreement”) or any service or care provided to the Resident by the Facility shall be settled exclusively by **binding arbitration**.

(R. p. 653) (emphasis in original) The Arbitration Agreement further declares the parties’ intention to resolve any dispute solely by arbitration by stating: “This means that the parties are waiving their right to a trial before a jury or a judge.” (R. p. 653) This language is clear and unambiguous and susceptible of no interpretation other than that the parties agreed to resolve any claims “exclusively by **binding arbitration**” and to “waiv[e] their right to a trial before a jury or a judge.” (R. p. 653) This language differs significantly from the language used by the parties in *Grant*. In *Grant*, there was no general statement of the parties’ agreement to arbitrate exclusively by binding arbitration or to waive the right to trial by jury or judge. The parties in *Grant* agreed only to resolve any claims “by binding arbitration administered by the [American] Health Lawyers Association (the [‘AHLA’]).” *Grant*, 383 S.C. at 128, 678 S.E.2d at 436-37. Therefore, in *Grant*, when the AHLA became unavailable, there was no separate general statement of

intent to arbitrate to demonstrate the parties' agreement to arbitrate in the event the AHLA became unavailable.

The Arbitration Agreement in the present case provides that "[a]ny arbitration proceeding that takes place under this Arbitration Agreement shall *follow the rules of the American Arbitration Association ('AAA')* and any resulting decision shall be enforceable by a court of competent jurisdiction." (R. p. 653, ¶ 2) (emphasis added). Again, this language is clear and unambiguous and susceptible of only one interpretation: The arbitration will "follow the rules of the [AAA]." In *Grant*, the parties had specifically agreed to "binding arbitration *administered by the [AHLA]*," allowing an inference that administration of the arbitration by the AHLA (rather than simply pursuant to its rules) was important to the parties under the very terms of their agreement. In the present case, however, the Arbitration Agreement did not require that any arbitration be *administered by the AAA*. This distinction alone makes *Grant* inapplicable to this case. (See Appellants' Brief at 18-21.)

Despite the clear language and intent of the Arbitration Agreement, Plaintiff attempts to use the AAA Healthcare Policy Statement to invalidate the Arbitration Agreement. (See Respondent's Brief at 11-22.) Plaintiff relies on AAA Rule R-2 which, by its very terms, does not *require* the AAA to administer the parties' arbitration, but merely "*authorizes*" it to do so. (See Respondent's Brief at 14-15; AAA Rule R-2.) Additionally, the Rule acknowledges that the "authorities and duties of the AAA are prescribed *in the agreement of the parties* and in these rules, and *may* be carried out through such of the AAA's representatives as it may direct." (*Id.*) This language is consistent with well-settled authority that arbitration is a matter of contract and the

designated arbitrator may not exceed the powers designated to the arbitrator by the parties. *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001); *Dowling v. Home Buyers Warranty Corp., II*, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). However, nothing in Rule R-2, nor in any of the other AAA Rules, "directly appointments [sic] the AAA as the arbitral forum" as Plaintiff contends. (Respondent's Brief at 15.) Nor is there any prohibition against use of the AAA Rules in an arbitration administered outside of the AAA. Moreover, the Arbitration Agreement does not grant to the AAA the authority to alter or invalidate the Arbitration Agreement or to decide that claims covered by the Arbitration Agreement cannot be arbitrated. The rules cited by Plaintiff are insufficient to overcome the parties' express agreement to resolve any disputes "exclusively by **binding arbitration**." (R. p. 653)

Notwithstanding the clear and unambiguous agreement to arbitrate, Plaintiff seeks to avoid arbitration by arguing that the AAA Healthcare Policy Statement renders the Arbitration Agreement invalid. The Arbitration Agreement does not mention the AAA Healthcare Policy Statement (which is not a part of the AAA Rules) and does not require administration by the AAA. Rather, the Arbitration Agreement requires only that any arbitration "*follow the rules of the [AAA]*." (R. p. 653, ¶ 2) (emphasis added) Plaintiff interprets this language to preclude any arbitration, even though such interpretation directly contradicts every other provision, and indeed the entire purpose, of the Arbitration Agreement. Plaintiff's interpretation leads to the result that the parties entered into a stand-alone arbitration agreement, the sole purpose of which was to agree to resolve all disputes "exclusively by **binding arbitration**," but intended that the AAA

Healthcare Policy Statement (not referenced anywhere in the Arbitration Agreement) would preclude arbitration.

It cannot seriously be contended that the parties, by entering into an Arbitration Agreement, actually intended not to arbitrate. At least two other interpretations are possible which comport with the language used in the Arbitration Agreement and avoid the absurd result that follows from Plaintiff's proposed interpretation:

- (1) The parties meant what they said when they agreed that any arbitration would merely "*follow the rules of the American Arbitration Association ('AAA')*." In other words, the parties intended that the arbitration, which they agreed would be the exclusive means of resolving any disputes between them, would be conducted in accordance with the AAA Rules, but not necessarily administered by the AAA; or
- (2) The parties, recognizing that the AAA Healthcare Policy Statement would not prevent them from submitting their dispute to the AAA (because the AAA will administer consumer healthcare disputes if the parties choose to submit this dispute there), intended to perform the ministerial task of confirming their binding agreement to arbitrate with a submission agreement so that the AAA would administer their arbitration.

"Common sense and good faith are the leading touchstones of construction of provisions of a contract; where one construction makes the provisions unusual or extraordinary and another construction which is equally consistent with the language employed, would make it reasonable, fair and just, the latter construction must prevail." *C.A.N. Enterprises*, 296 S.C. at 377-78, 373 S.E.2d at 586. To say the least, interpreting a provision which merely requires application of the AAA Rules to wholly invalidate the entire Arbitration Agreement in which that provision is located would be unusual and extraordinary. Defendants' construction, which comports with the parties' agreement to resolve all disputes exclusively by arbitration, is much more reasonable than the

construction proposed by Plaintiff, which leads to the result that the parties' agreement to arbitrate is, and was from the outset, an agreement not to arbitrate.

B. Section 5 requires appointment of a substitute arbitrator in the event of a vacancy or lapse in naming an arbitrator.

Once a valid and enforceable arbitration agreement is found to exist, Section 4 of the FAA mandates that the matter be submitted to arbitration. 9 U.S.C. § 4. Congress contemplated the possibility that an arbitrator designated by the parties may not be available to the parties for any host of reasons. Therefore, it enacted Section 5 of the FAA, which provides that

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or *if for any other reason there shall be a lapse in the naming of an arbitrator . . .*, or in filling a vacancy, then upon application of either party to the controversy *the Court shall designate and appoint an arbitrator . . .* who shall act under the same force and effect as if he . . . had been specifically named therein.

9 U.S.C. § 5 (emphasis added). The parties expressly agreed that the Arbitration Agreement would be governed by the FAA. Therefore, they have a right to expect that all relevant provisions of the FAA (including Section 5) will be applied. *See Khan v. Dell, Inc.*, 669 F.3d 350 (3d Cir. 2012) (finding that Section 5 of the FAA required appointment of a substitute arbitrator where the designated forum (NAF) had ceased arbitration of consumer claims and was therefore no longer available).

In an effort to avoid the Arbitration Agreement, Plaintiff argues that an arbitrator cannot be appointed as required by Section 5 because the AAA was "integral" to the Arbitration Agreement. However, as noted above, the Arbitration Agreement does not require that the AAA administer any arbitration, but merely requires arbitration to take

place pursuant to the AAA Rules. As the Arbitration Agreement does not even designate the AAA as the administrator of any arbitration, the AAA's administration of arbitration cannot be integral to the Arbitration Agreement. In *Grant*, the parties had agreed to "binding arbitration administered by the [AHLA]." *Grant*, 383 S.C. at 128, 678 S.E.2d at 437. The parties' decision in the present case not to require administration by the AAA demonstrates that administration by the AAA was not integral to the Arbitration Agreement.

Grant indicates that "[t]here is a dispute in the case law as to whether Section 5 applies in cases where, as here, the parties have specified an *exclusive* arbitral forum, but that forum is *no longer available*." *Grant*, 383 S.C. at 130, 678 S.E.2d at 438 (emphasis added). Unlike the arbitration agreement at issue in *Grant*, the parties here did not designate any arbitral forum (much less an exclusive one), but merely agreed to follow the AAA Rules. (R. p. 653, ¶ 2) Moreover, the AAA is available. Thus, *Grant* is inapposite.

Plaintiff further relies on the cases of *In Re Salomon*, 68 F.3d 554 (2d Cir. 1995); *Smith Barney v. Critical Health Systems in North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000); and *Buice v. WMA Securities, Inc.*, 380 S.C. 149, 668 S.E.2d 430 (Ct. App. 2008). However, none of these cases stands for the proposition that mere reference to a particular arbitral forum or arbitral rules automatically renders the forum or rules "integral" to the parties' arbitration agreement. Moreover, the AAA Rules can be applied by any arbitrator pursuant to the Arbitration Agreement. Additionally, the AAA will administer the parties' dispute if the parties so choose.

In *In Re Salomon*, the defendants "had signed an agreement to arbitrate (under the Constitution and rules of the NYSE) any dispute arising out of their employment by Salomon Brothers." *In Re Salomon*, 68 F.3d at 556. The trial court ordered shareholder derivative claims to arbitration before the NYSE. The NYSE determined that "shareholder controversies were not appropriately within the mandatory provisions of its Constitution" and that "jurisdiction must be based on the consent of the parties to arbitrate, and neither the shareholders who initiated the derivative action nor Salomon have consented to arbitration." *Id.* (internal punctuation omitted). The Second Circuit noted that "under the arbitration agreements, all disputes were to be arbitrated by the NYSE and only the NYSE, 'in accordance with the [NYSE] Constitution and rules.' The NYSE Constitution clearly permits the NYSE to refuse the use of its facilities for the arbitration for any particular dispute. NYSE Const. Art. XI, Sec. 3. When the NYSE so refuses, there is no further promise to arbitrate in another forum." *Id.* at 557. The Second Circuit noted that "we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate disputes *only* before the NYSE and the NYSE, in turn, exercising its discretion under its Constitution, has refused the use of its facilities to arbitrate the dispute in question." *Id.* at 558. Notably, the arbitration agreements at issue in *In Re Salomon* allowed the NYSE to decline jurisdiction in particular cases, did not specify that they covered shareholder derivative claims, and did not contain a general statement requiring all disputes to be resolved "exclusively by binding arbitration" or waiving the right to trial by jury or judge. The Second Circuit "read the agreements here as providing for arbitration *only* before the NYSE." *Id.* at 561 (emphasis added). It further held that "whether the NYSE would arbitrate the dispute

'was central to the parties' agreement to arbitrate.'" *Id.* (emphasis added). The court also held that "the 'dominant intent' of the parties was 'to arbitrate before particular arbitrators.'" *Id.* (emphasis added). Also, the NYSE refused to arbitrate based on concerns over "the problems shareholder derivative suits pose." *Id.* at 560. Thus, *In Re Salomon* involved a unique circumstance in which the identity of the arbitrator was at least as important to the parties as whether to arbitrate. As the language in the Arbitration Agreement in the present case differs significantly from the language at issue in *In Re Salomon*, this case is inapposite.

In *Smith Barney*, the Court held that the claimant was required to pursue its arbitration before one of the three specified fora (NYSE, NASD, or AMEX) and could not pursue its claims before another forum (AAA) because "the NASD, NYSE, and AMEX arbitration rules provide that claims based on transactions that occurred more than six years before arbitration was filed are not eligible for arbitration [and] Smith Barney was entitled to rely upon [these rules]." *Smith Barney*, 212 F.3d at 862. There was no claim that the NYSE, NASD, or AMEX was unwilling to arbitrate the dispute. Therefore, *Smith Barney* did not involve a failed forum as Plaintiff contends is the case here. *Id.* ("Here Critical Health has the choice of three fora. We can see no reason to pass over the three specified fora and allow arbitration to proceed in a fourth unspecified arena."). This case does not support Plaintiff's position.

In *Buice*, the Court of Appeals found that a claimant was not required to arbitrate a securities dispute against a firm whose membership in the NASD had been terminated, suspended, canceled, or revoked. In reaching its decision, the Court of Appeals found significant the legislative history of NASD Rule 10301 which indicated that the reason

the NASD refused to enforce pre-dispute arbitration agreements in such situations was that "terminated, suspended, barred or otherwise defunct firms have a significantly higher incidence of nonpayment of arbitration awards than do active firms." *Buice*, 380 S.C. at 155-56, 668 S.E.2d at 433. Thus, NASD Rule 10301 which assured a customer that it would only be required to arbitrate if the respondent member remained in good standing with the NASD was integral to the arbitration agreement. Thus, *Buice* involved specific facts demonstrating that the designated forum was important to the parties' agreement to arbitrate and does not support Plaintiff's position.

As in the previous cases, the Court in *Grant* did not merely presume that the designated forum was integral, but relied on evidence indicating the importance of that forum to the parties. *Grant*, 383 S.C. at 131, 678 S.E.2d at 438-39. The Court noted that "[t]o determine whether a named arbitrator is an integral part of the agreement or an ancillary logistical concern, courts look to the 'essence' of the arbitration agreement." *Id.*

The Court noted that

[u]nder AHILA policy, the parties may not vary the rules on communications, service, counting of days, publication and form of the award, release of documents, or administration. The parties are bound by a panel of arbitrators selected by the service. In our view, the parties' waiver of this set of rights in agreeing to arbitrate before the AHILA reflects their specific intent to arbitrate *exclusively* before that body. Furthermore, the designation of a forum such as the AHILA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration.

Id. The present case differs from *Grant* in that the parties indicated only that the AAA Rules would apply, and these rules can be applied by any arbitrator. The parties agreed to resolve all disputes "exclusively by binding arbitration," but did not agree to arbitrate exclusively in an AAA forum. Accordingly, submitting the parties' dispute to arbitration

pursuant to the AAA Rules—whether administered by the AAA or someone else—does not contradict any provision of the parties' Arbitration Agreement. Moreover, if Plaintiff truly believes that the Arbitration Agreement requires her to arbitrate exclusively in an AAA forum, this forum is available.³

V. Defendants did not waive the right to enforce the Arbitration Agreement.

Plaintiff contends that the Defendants have waived the right to arbitration simply by responding to Plaintiff's use of the court system and engaging in limited discovery targeted solely at enforcement of the Arbitration Agreement, even though Defendants asserted the Arbitration Agreement as a defense in their initial pleadings. Plaintiff's argument fails to demonstrate any action of Defendants that could constitute a voluntary and intentional abandonment of the right to arbitrate. Rather, Plaintiff seeks to deprive Defendants of their contractual right to arbitration simply because Defendants defended against Plaintiff's use of the court system and obtained discovery necessary to enforce the Arbitration Agreement. (Respondent's Brief at 22-24.) Plaintiff has failed to cite any authority in support of its contention that Defendants waived the right to enforce the Arbitration Agreement merely by defending themselves in litigation initiated by Plaintiff,

³ Plaintiff's suggestion that Defendants have argued "that the FAA would somehow force the Personal Representative of Ms. Jones' Estate to now execute a 'post-injury' arbitration agreement" (Respondent's Brief at 22) is a misstatement of Defendants' argument and misses the point. Plaintiff seeks to avoid the Arbitration Agreement on the false premises that the Arbitration Agreement requires the AAA to administer the parties' arbitration and that the AAA is "unavailable" to her. Defendants have shown that the AAA is not "unavailable" and that the Arbitration Agreement can be enforced in accordance with Plaintiff's purported preferred interpretation (administration by the AAA) if Plaintiff simply submits her dispute to the AAA. (Appellants' Brief at 21-23.) If Plaintiff's interpretation of the Arbitration Agreement as requiring arbitration administered by the AAA is a serious construction of the language of the contract rather than a contrived attempt to avoid her contractual obligations, then it defies logic that she would not simply submit her claims to the AAA as she claims the contract requires.

responding to discovery, and engaging in discovery limited to enforcement of the Arbitration Agreement. Such limited engagement in the litigation process (caused by Plaintiff's failure to abide by the Arbitration Agreement) is insufficient to establish a knowing and voluntary waiver of the right to compel arbitration, particularly where Defendants immediately raised arbitration in their Answers; challenged the Plaintiff's Motion to Strike the arbitration defenses; and conducted limited discovery for the express purpose of enforcing the Arbitration Agreement. Defendants have not waived their right to enforce the Arbitration Agreement. *See Carlson v. S.C. State Plastering, LLC*, Ct. App. Opinion No. 5143 (June 12, 2013) (finding no waiver despite two-year delay while defendants pursued a motion to dismiss on the merits where defendants raised the issue of arbitration since the inception of the case). (*See also* Appellants' Brief at 26-29.)

CONCLUSION

The parties entered into an arbitration agreement which covers Plaintiff's claims. The parties agreed that their transaction involved interstate commerce and that the FAA applies. Defendants asserted the issue of arbitration in their Answers and have consistently maintained their position that Plaintiff's claims belong in arbitration. Plaintiff asserts no fault with the substance of the Arbitration Agreement other than the purported unavailability of the AAA. The Arbitration Agreement, by its own express terms, requires only that arbitration proceed under the AAA Rules, not necessarily in an AAA forum. Therefore, there is no reason that the present dispute cannot be resolved in an arbitration under the AAA Rules as required by the parties' Arbitration Agreement. Moreover, the AAA is available and willing to arbitrate Plaintiff's claims with a submission agreement. Therefore, if arbitration in an AAA forum is truly important to Plaintiff, that forum is available to her. Given these available alternatives, federal and

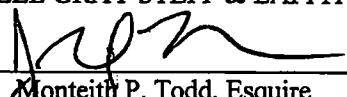
State policies favoring arbitration, and provisions of the FAA mandating enforcement of the Arbitration Agreement, the Arbitration Agreement must be enforced rather than invalidated.

For the reasons set forth herein and in Appellants' Brief, Defendants respectfully request that the Court reverse the trial court's Order Denying Defendants' Motion To Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration and staying the litigation.

Counsel for Appellants certifies that the Final Reply Brief of Appellants complies with Rule 211(b) of the South Carolina Appellate Court Rules.

Respectfully submitted,

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Attorneys for Appellants

August 30, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
Court of Appeals Case No. 2012-207308

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones Respondent,
v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. Appellants.

PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp
& Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel
in this action with a copy of the Final Reply Brief of Appellants by mailing a copy of
same to counsel via United States Mail, postage prepaid, at the following address(es):

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SC Court of Appeals

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Robin C. Owens

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Legal Assistant

8/30, 2013

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones, Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the
Lowcountry and/or Uni-Health Post Acute Network of
the Lowcountry, United Clinical Services, Inc., United
Rehab, Inc., and UHS-Pruitt Corporation, Appellants.

Appellate Case No. 2012-207308

Appeal From Hampton County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-317
Heard May 5, 2014 – Filed August 6, 2014

AFFIRMED

Monteith Powell Todd, John Michael Montgomery, and
Robert E. Horner, all of Sowell Gray Stepp & Laffitte,
LLC, of Columbia; and Jason Edward Bring, W. Jerad
Rissler, and Tyler Lawrence Arnold, all of Arnall Golden
Gregory, LLP, of Atlanta, Georgia, for Appellants.

Lee Deer Cope, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Hampton; Charles McCutchen, of Lanier & Burroughs, LLC, of Orangeburg; Matthew Vernon Creech, of Peters Murdaugh Parker Eltzroth & Detrick, PA, of Ridgeland; and Margie Bright Matthews, of Bright Matthews Law Firm, LLC, of Walterboro, for Respondent.

PER CURIAM: In this wrongful death and survival action alleging nursing home negligence, Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical Services, Inc., United Rehab, Inc., and UHS-Pruitt Corporation (collectively, "Heritage") appeal from the trial court's denial of its motion to compel arbitration. Heritage argues the trial court erred in (1) concluding the arbitration agreement was not governed by the Federal Arbitration Act (FAA) when the transaction between the parties involved interstate commerce and (2) refusing to enforce the parties' Arbitration Agreement in accordance with its plain terms. We affirm.

1. We affirm as to whether Ellen Jenkins had authority to sign the Arbitration Agreement on Elizabeth Jones' behalf when Jones was competent at the time she was admitted to Heritage, and Jenkins did not possess a health care power of attorney to sign either contract on Jones' behalf.¹ We find the evidence reasonably supports the trial court's findings that Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf because Jones was competent at the time of her admission, and Sally Dobson, the admissions director for Heritage, agreed it would have been more appropriate for Jones to sign the contract herself because she was competent, and Dobson did not know if Jenkins had a power of attorney. Therefore, we find the Arbitration Agreement is not enforceable against Respondent. See *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008) (stating an "[a]ppeal from the denial of a motion to compel arbitration is subject to de novo review"); *id.* ("Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings."); *Peoples Fed. Sav. & Loan Ass'n v. Myrtle Beach Golf & Yacht Club*, 310 S.C. 132, 145, 425 S.E.2d 764, 773 (Ct.

¹ Jones was admitted to Heritage by Jenkins, her sister, who executed the paperwork for her admission.

App. 1992) ("Agency is a fiduciary relationship which results from the manifestation of consent by one person to another to be subject to the control of the other and to act on his behalf."); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.*, 343 S.C. 424, 434, 540 S.E.2d 113, 118 (Ct. App. 2000) ("Agency may be implied or inferred and may be proved circumstantially by the conduct of the purported agent exhibiting a pretense of authority with the knowledge of the alleged principal."); *id.* at 433, 540 S.E.2d at 118 ("An agency may not be established solely by the declarations and conduct of an alleged agent."); *McCall v. Finley*, 294 S.C. 1, 6, 362 S.E.2d 26, 29 (Ct. App. 1987) ("A party asserting agency as a basis of liability must prove the existence of the agency, and the agency must be clearly established by the facts."); *Justus v. Universal Credit Co.*, 189 S.C. 487, 495, 1 S.E.2d 508, 511 (1939) ("[I]t is the duty of one dealing with an agent to use due care to ascertain the scope of the agent's authority . . .") (internal quotation marks and citation omitted); *cf. Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 353-54, 755 S.E.2d 450, 454 (2014) (finding that under the Adult Health Care Consent Act, a sister who lacked a power of attorney did not have the capacity to bind the decedent to the voluntary arbitration agreement because the scope of the sister's authority to consent to decisions concerning the decedent's health care extended only to the admission agreement, which was the basis upon which the facility agreed to provide health care and the sister agreed to pay for it, and because the separate arbitration agreement concerned neither health care nor payment, but instead provided an optional method for dispute resolution between the facility and the decedent or the sister should issues arise in the future); *Life Care Ctrs. of Am. v. Smith*, 681 S.E.2d 182, 185 (Ga. Ct. App. 2009) (finding "the plain language of the health care power of attorney did not give [the daughter] the power to sign away her mother's or her mother's legal representative's right to a jury trial").

2. We decline to address Heritage's remaining arguments because we find this issue is dispositive. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (concluding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

Accordingly, the decision of the trial court is

AFFIRMED.

FEW, C.J., and SHORT and GEATHERS, JJ., concur.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court Of Common Pleas
Carmen T. Mullen, Circuit Court Judge

Case Nos. 2010-CP-25-491 and 2010-CP-25-492
South Carolina Court of Appeals No. 2012-207308

RECEIVED

AUG 21 2014

SC Court of Appeals

CHERRY SCOTT, as Personal Representative of the Estate
of ELIZABETH JONES,

Respondent,

v.

HERITAGE HEALTHCARE OF ESTILL, LLC, d/b/a
Heritage of the Lowcountry and/or Uni-Health Post Acute
Care of the Lowcountry, UNITED CLINICAL SERVICES,
INC., UNITED REHAB, INC., and UHS-PRUITT
CORPORATION,

Appellants.

PETITION FOR REHEARING
AND INCORPORATED MEMORANDUM IN SUPPORT

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Attorneys for Appellants

INTRODUCTION

By unpublished opinion (2014-UP-317), this Court affirmed the decision of the trial court that Ellen Jenkins did not have “authority to sign the Arbitration Agreement on Elizabeth Jones’ behalf when Jones was competent at the time she was admitted to Heritage, and Jenkins did not possess a health care power of attorney to sign either contract on Jones’ behalf.” *Scott v. Heritage Healthcare of Estill, LLC*, No. 2014-UP-317 at 2 (S.C. Ct. App. Aug. 6, 2014). The Court’s decision applied an overly-deferential “any evidence” standard even though there were no factual disputes, and the agency issue was purely one of law.¹ In addition, the decision overlooked the undisputed evidence that Jones specifically authorized her sister, Ms. Jenkins, to act on her behalf, focusing instead on the irrelevant *post hoc* opinion testimony of an admissions director regarding whether she believed “it would have been more appropriate for Jones to sign the contract herself because she was competent.” *Id.*

Further, the decision did not follow the Supreme Court’s recent directive in the nursing home arbitration case of *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014). In *Coleman*, the Supreme Court held that when, as here, a nursing home admission agreement and an arbitration agreement are signed by the same person at the same time, then there is a merger and both agreements are enforceable absent some contrary intent reflected in the agreements. 407 S.C. at 355, 755 S.E.2d at

¹ “When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the trial court properly applied the law to those facts. *In re Estate of Boynton*, 355 S.C. 299, 301, 584 S.E.2d 154, 155 (Ct.App.2003); *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court’s legal conclusions. *Boynton*, 355 S.C. at 301-02, 584 S.E.2d at 155; *J.K. Constr., Inc. v. W. Carolina Reg’l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999).” *Boyd v. Liberty Life Ins. Co.*, 399 S.C. 401, 406, 732 S.E.2d 180, 183 (Ct. App. 2012).

455 (where "the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction," then "[u]nless there is a contrary intention ... , there [is] a merger."). In this case, it is undisputed that Ms. Jenkins signed all of the admission paperwork, including the arbitration agreement, at the same time and with the consent of the resident, Ms. Jones. Finally, the decision overlooked Appellants' ratification, estoppel, and third-party beneficiary arguments.

I. The Court's Decision Overlooks the Undisputed Evidence that Ms. Jones Authorized Ms. Jenkins to Act on Her Behalf.

The undisputed evidence clearly established that Ms. Jones expressly authorized Ms. Jenkins to negotiate her admission to Heritage of the Lowcountry ("Lowcountry"). (R. p. 638, page 8, line 18-p. 639, page 10, line 14; R. p. 629, page 9, lines 2-17; *see also* Final Brief of Appellants ("Appellants' Brief") at 11-13; Final Reply Brief of Appellants ("Appellants' Reply Brief") at 3-4.) Ms. Jones placed no limitations on Ms. Jenkins with respect to her authority in dealing with Lowcountry. (R. p. 629, page 10, lines 2-10.) Plaintiff acknowledged that she knew that Ms. Jenkins was signing the admission paperwork for Ms. Jones. (R. p. 629, page 9, lines 12-17.) This evidence of a specific grant of authority by Ms. Jones to Ms. Jenkins to act on her behalf in negotiating the admission to Lowcountry is undisputed. There is absolutely no evidence in the record that contradicts the undisputed evidence that Ms. Jenkins was acting under the authority expressly granted to her by Ms. Jones. Thus, the record clearly and unambiguously establishes that Ms. Jenkins had actual authority to act on behalf of Ms. Jones.

The sole stated basis for the conclusion that "Jenkins lacked authority to enter into the Arbitration Agreement on Jones' behalf" is that "Jones was competent at the time of her admission, and Sally Dobson, the admissions director for Heritage, agreed it would

have been more appropriate for Jones to sign the contract herself because she was competent, and Dobson did not know if Jenkins had a power of attorney.” 2014-UP-317 at 2.

These findings, however, do nothing to contradict the undisputed evidence that Ms. Jones, in fact, granted authority to Ms. Jenkins to negotiate her admission to Lowcountry. None of the cases cited in the decision holds that a competent person cannot authorize an agent to act on her behalf or that such actual authority is somehow destroyed because the party accepting the agent’s actual authority cannot establish apparent authority. *See, e.g., R&G Const., Inc. v. Lowcountry Regional Transp. Authority*, 343 S.C. 424, 432, 540 S.E.2d 113, 117 (Ct. App. 2000) (“A true agency relationship may be established by evidence of actual *or* apparent authority.”) (emphasis added); *McCall v. Finley*, 294 S.C. 1, 7, 362 S.E.2d 26, 30 (Ct. App. 1987) (before addressing apparent authority court found there was no evidence of actual authority). Moreover, the admissions director’s opinion testimony about what would have been “more appropriate” does nothing to undermine the undisputed evidence that Ms. Jones expressly granted Ms. Jenkins actual authority to act on her behalf in connection with her admission to Lowcountry. Indeed, even to the extent an action may be considered “more appropriate,” it still presumes that the alternative action was, as here, “appropriate.”

II. The Decision Overlooks The Supreme Court’s Recent Arbitration Agreement Merger Doctrine In *Coleman*.

The decision overlooks the holding of the Supreme Court that where “the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction,” then “[u]nless there is a contrary intention . . . , there [is] a merger.” *Coleman*, 407 S.C. 346, 355, 755 S.E.2d 450, 455 (2014). Here,

Respondent acknowledges that the resident's sister, Ms. Jenkins, signed all of the admission paperwork, including the arbitration agreement, on behalf of the resident as part of a single transaction. (See Respondent's Final Resp. Br., p. 5.) Respondent admits that Ms. Jenkins met with the "admissions director, Sally Dobson, and 'signed in' her sister for therapy." (*Id.*) Respondent admits that "Ms. Jenkins executed *all* of the documents at issue, including the Arbitration Agreement." (*Id.* (emphasis added).) Respondent further admits that "[t]he admissions paperwork contained the separate, stand-alone Arbitration Agreement at issue. (*Id.*)

Thus, under *Coleman*, because the Admission Agreement and Arbitration Agreement were executed at the same time, by the same parties, for the same purposes, in a single transaction, there was a merger of the Admission Agreement and Arbitration Agreement. Moreover, Plaintiff failed to produce any evidence of a contrary intent among the admission paperwork, thereby failing to rebut the merger. Thus, the Arbitration Agreement is enforceable against Ms. Jones, just the same as her other admission paperwork pursuant to which she received care from the facility.

III. The Court's Decision Overlooks Appellants' Ratification, Estoppel, and Third-Party Beneficiary Arguments.

Appellants demonstrated that Ms. Jones ratified the agreements executed by Ms. Jenkins by accepting the benefits of those agreements (Appellants' Brief at 13; Appellants' Reply Brief at 4-5); that Ms. Jones was bound by the Arbitration Agreement as a third-party beneficiary (Appellants' Brief at 13-14; Appellants' Reply Brief at 5-6); and that Plaintiff was estopped from denying the enforceability of the Arbitration Agreement (Appellants' Brief at 14-15; Appellants' Reply Brief at 5-6). The decision overlooks these arguments.

CONCLUSION

For the reasons set forth herein and in Appellants' Brief and Appellants' Reply Brief, Appellants respectfully request that the Court grant its Petition for Rehearing, reverse the trial court's Order Denying Defendants' Motion To Compel Arbitration and Stay Proceedings and remand this matter for an Order compelling Plaintiff to pursue her claims in arbitration and staying the litigation.

Respectfully submitted,

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August 21, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
Court of Appeals Case No. 2012-207308

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones Respondent,
v.

Heritage Healthcare of Estill, LLC d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Network of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation. Appellants.

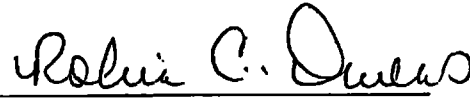
PROOF OF SERVICE

I, the undersigned legal assistant, of the law offices of Sowell Gray Stepp
& Laffitte, LLC, attorneys for Appellants, do hereby certify that I have served all counsel
in this action with a copy of the Petition for Rehearing and Incorporated Memorandum in
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8/21, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492
South Carolina Court of Appeals No. 2012-207308

Cherry Scott, as Personal Representative of the Estate of
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and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation Appellants.

Respondent's Return to Petition for Rehearing

Appellant/Petitioner's Petition for Rehearing should be denied. Contrary to the assertions set forth in the Petition, the Opinion does not overlook or misapprehend the law or the facts before the Court of Appeals.

I. Appellants Have Failed to Raise and Preserve Arguments It Now Presents as Grounds for Rehearing.

The first basis for denial of the Petition is issue preservation. Appellants now argue, for the first time, that the admission contract and arbitration agreement merge into one so that if there is evidence that Ms. Jones authorized her sister, Ms. Jenkins, to sign an admission agreement, she authorized her to sign the arbitration agreement as well. Multiple searches of Appellants' briefs to this Court fail to find the word "merger" ever

mentioned. Appellants attempt to raise this issue for the first time after the Opinion has issued. The issue was not raised and ruled upon by the trial court. The issue was not raised to this Court. To now claim rehearing is warranted based upon the issue of merger is not permitted under our appellate rules.

"[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. *Elam v. S.C. DOT*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court). *Elam*, 361 S.C. at 23-24, 602 S.E.2d at 779-80.

Nothing would have prevented the issue of merger from being framed before the trial court and then briefed from the outset of this appeal. Thus, this issue has not been preserved and should be disposed of summarily.

II. Even If Appellants Had Raised and Preserved the Issue of Merger, *Coleman v. Mariner Health Care, Inc.* Supports the Findings of this Court's Initial Opinion.

Secondly, the Appellants' reliance on *Coleman v. Mariner Health Care, Inc.*, 407 S.C. 346, 755 S.E.2d 450 (2014), is misplaced. Appellants rely heavily in their petition on the following language from *Coleman*: "Here, the documents were executed at the same time, by the same parties, for the same purposes, and in the course of the same transaction. Unless there is a contrary intention, appellants are correct that there was a merger." *Coleman*, 407 S.C. at 355. HHE fails to analyze and apply the facts of that case which specifically looks at whether the admission agreement and arbitration agreement are separate from one another. HHE's omission is telling. The Arbitration Agreement at issue in this case specifically states that this agreement is separate and apart from the admission agreement:

The Resident is not required to sign this Arbitration Agreement in order to be admitted to or to remain in the Facility.

(R. pp. 645-646). This is not shocking or new to Appellants, as they argued in their Final Brief to this Court the following:

It is undisputed that Plaintiff signed the Arbitration Agreement, a two-page, standalone agreement clearly titled "Resident and Facility Arbitration Agreement." (R. pp. 645-646).

(Final Brief of Appellants, p. 10) (emphasis added). Furthermore, Appellants' Reply Brief makes clear that this agreement was "optional." (Reply Brief of Appellants, p. 4).

When the facts of the case at bar are analyzed to determine the intent of the parties, it is clear that the two documents do not merge. As the *Coleman* court noted: "On its face, this clause recognizes the 'separatedness' of the arbitration agreement and the admission agreement, not a merger of the two contracts." *Coleman*, 407 S.C. at 355.

Therefore, even if this issue had been raised and ruled upon to the Circuit Court, or preserved for review by this Court, a proper application of *Coleman* to the facts of this case, requires a finding that there would be no merger and no valid arbitration agreement.

Despite the “Monday-morning-quarterbacking” strategy now being employed, the facts still lead to only one conclusion: the only evidence in the record is that Ms. Jenkins signed a separate, standalone, optional arbitration agreement without authority. The burden is on the Appellants to prove that Ms. Jones gave her sister authority to sign the Arbitration Agreement. This has not been met.

Furthermore, Appellants’ position that the decision overlooks its arguments as to ratification, estoppel and third-party beneficiary is without merit. According to *Coleman*, the only authority that can be found is for the Admission Agreement. However, as noted above, because of the “separatedness” of the arbitration and admission agreements, Appellants cannot rely on the limited authority to somehow expand that authority to the Arbitration Agreement.

III. As an Additional Sustaining Ground, Appellant’s Appeal Fails Because Appellants Have Waived Any Right to Demand Arbitration.

Finally, although reconsideration is unnecessary, if that exercise were undertaken none of these issues need to be reached because clearly, Appellants have waived their right to demand arbitration. This issues was addressed fully in Respondent’s Final Brief (pp. 22-24) and Respondent now incorporates these arguments by reference.

If reconsideration is considered, though, the dispositive issue of waiver should be address. These proceedings were commenced by filing two Notices of Intent that were served on the Defendants on or about April 7, 2010. (R. pp. 39-88). Appellant HHE could have moved at that point to move to compel arbitration. In fact, S.C. Code § 15-79-120

specifically addresses this issue and states that parties can agree to arbitrate prior to filing a medical malpractice action. Instead, Appellant participated in the Notice of Intent proceedings, attended a failed mediation, and the Summonses and Complaints were filed on October 13, 2010. HHE's motion was not filed until August 4, 2011. During that long delay, HHE engaged in discovery. Appellant has served and answered discovery, though they have attempted to limit that discovery only to "arbitration" issues. HHE has taken and defended depositions. Not only did HHE participate in the pre-suit mediation on September 10, 2010, but also a second mediation on August 11, 2011. Throughout this time frame HHE has also participated in procedural and discovery hearings before the trial court, rather than moving to compel arbitration. In fact, Appellant HHE has produced 6,211 pages of discovery documents during the course of this litigation. HHE has repeatedly availed itself of the court system since April of 2010.

Clearly, in South Carolina, the "right to enforce an arbitration clause may be waived." *Davis v. KB Home of S.C., Inc.*, 394 S.C. 116, 131, 713 S.E.2d 799, 807 (2011). Our Courts have held that less time constitutes waiver. *Rhodes*, 374 S.C. at 125, 128 647 S.E.2d at 250, 252 (Ct. App. 2007). This Court recently addressed the waiver of arbitration in *Carlson v. S.C. State Plastering, LLC*, (Ct. App. Opinion No. 5143, June 12, 2013). "In order to establish waiver, a party must show prejudice through an undue burden caused by delay in demanding arbitration." *Liberty Builders, Inc. v. Horton*, 336 S.C. 658, 665, 521 S.E.2d 749, 753 (Ct. App. 1999). The question of whether waiver exists is a fact based analysis based on the facts of each particular case. *Carlson*, p. 5.

Unlike the factual situation in *Carlson*, in this case – without question – HHE participated in extensive discovery. The parties have conducted extensive written and

deposition discovery, participated in two mediations, and attended multiple Court hearings. The costs associated with discovery that may not have been expended in arbitration is an example of prejudice that is beyond mere inconvenience. *Evans v. Accent Manufactured Homes, Inc.*, 352 S.C. 544, 575 S.E.2d 74 (Ct. App. 2003). The Estate has borne the costs of two failed mediations. Most prejudicially, now the Respondent has been involved for years in the appellate process and has been delayed in finalizing discovery and preparing for trial. Had HHE had moved in a timely manner, these issues might have been resolved by this point. Appellant, though, chose to avail itself of the courts and delay pursuing purported rights to arbitration. The trial court properly denied HHE's request on this ground alone, and if reconsideration is considered, this issue should be squarely addressed by this Court, finding that Appellant has waived any right to demand arbitration.

Respectfully submitted,

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August __, 2014
Hampton, S.C.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge

Case No. 2010-CP-25-491 and 492

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones.....Respondent,

v.

Heritage Healthcare of Estill, LLC, d/b/a Heritage of the Lowcountry
and/or Uni-Health Post Acute Care of the Lowcountry, United Clinical
Services, Inc., United Rehab, Inc., and UHS Pruitt Corporation Appellants.

CERTIFICATE OF SERVICE

I, Shanna M. Jarrell, do hereby certify that I have served all counsel in this action
with a copy of Respondent's Return to Petition for Rehearing by mailing a copy of the
same to counsel via United States Mail, postage prepaid, at the following address(es):

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Shanna M. Jarrell

August 29, 2014

The South Carolina Court of Appeals

Cherry Scott, as Personal Representative of the Estate of
Elizabeth Jones, Respondent,

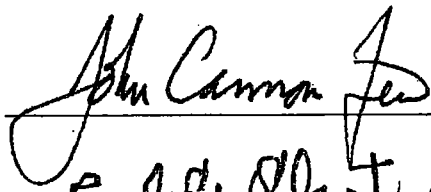
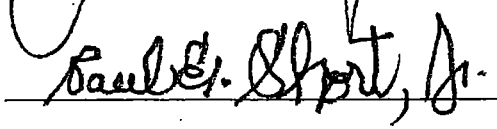
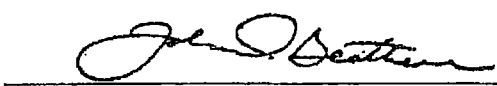
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Appellate Case No. 2012-207308

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

	C.J.
	J.
	J.

Columbia, South Carolina

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FILED

September 18, 2014